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THE "LEGAL VACUUM" OF DETAINEE RIGHTS

A Thesis

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The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, The United States Army, or any other governmental agency.

by Margaret B. Baines
Major, U.S. Army
Judge Advocate General's Corps

45th JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1997

THE "LEGAL VACUUM" OF DETAINEE RIGHTS

Margaret B. Baines
Major, U.S. Army
Judge Advocate General's Corps

ABSTRACT: The United States military lacks procedures for prolonged detention of civilians who threaten force or host nation security during nontraditional military operations, or "operations other than war" (OOTW). While the Geneva Conventions govern treatment of persons captured during international armed conflicts, those captured during OOTW have no powerful treaty to protect them. Domestic law and international treaties to which the U.S. is a party provide detainees with only minimal protections, and there is little military doctrine on the treatment of civilians captured during OOTW. This "legal vacuum" became an issue during civilian detentions in Operations Restore Hope (Somalia, 1992) and Uphold Democracy (Haiti, 1994). Development of uniform procedures in this area will serve the U.S. military when it inevitably finds itself forced to detain civilians again in future OOTW. Uniform detainee procedures would also simplify the complicated international law on detainees into a cohesive body that the military can use for training and enforcement. Finally, these procedures will promote respect for the rule of law in chaotic environments. This paper proposes procedures for detainee treatment and due process procedures tailored for inclusion into the *Department of Army, Regulation 190-8, Enemy Prisoners of War Administration, Employment and Compensation (1 June 1982).*

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THE "LEGAL VACUUM" OF DETAINEE RIGHTS

MAJOR MARGARET B. BAINES*

I. Introduction

The issue is "less that the law is being violated or complied with than that this is a legal vacuum, . . . "[1]

- Professor Richard Falk of the Center for International Studies at Princeton University

A. The Problem

The United States military lacks procedures for prolonged detention of civilians who threaten force security during nontraditional military operations. These civilians include

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* Judge Advocate General's Corps, United States Army. Chief, Legal Assistance, Trial Counsel and Administrative Law Attorney, XVIII Airborne Corps, Fort Bragg, North Carolina, 1993-1996; Instructor, U.S. Army Signal School, Fort Gordon, Georgia, 1990; Commander, Headquarters and Headquarters Detachment, and Executive Officer, 59th Signal Company, 509th Signal Battalion, Camp Darby, Italy, 1986-1989. This article is based on a written dissertation submitted to satisfy, in part, the Master of Laws degree requirements for the 45th Judge Advocate Officer Graduate Course.

[1] Larry Rohter, *Legal Vacuum in Haiti is Testing U.S. Policy*, N.Y.TIMES, November 4, 1994, at A32 [hereinafter Rohter].

the owner of the warehouse full of illegal weapons[2] and the advisor to the warlord who orchestrated attacks that killed American troops.[3] These persons are called "detainees."

In traditional military operations, known in the vernacular as "wars," the U.S. military usually transferred these civilians to a coalition nation for prosecution, or simply released them at the end of the conflict.[4] However, the end of the Cold War found the military involved in a variety of operations that were not "wars" but were difficult to place into any one category. Military doctrine has labeled these nontraditional military operations "operations other than war" (OOTW).[5] OOTW have often placed the military

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[2] *Id.* (describing detention by the U.S. military during Operation Restore Democracy of the owner of a warehouse where weapons for Haitian paramilitary groups were stored).

[3] *See* Rick Atkinson, *Wide Look at Somalia Violence Vowed,* WASH. POST, December 1, 1993, at A20 (describing detention by U.S. military during Operation Restore Hope of a close advisor of warlord Mohammed Aided) [hereinafter Atkinson].

[4] *See* MAJOR GENERAL GEORGE S. PRUGH, LAW AT WAR: VIETNAM 1964-1973 62 (1975) [hereinafter Vietnam]; John Parkerson, *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause,* 133 MIL. L. REV. 31, 69 (1991) [hereinafter Parkerson].

[5] *See* DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 13-0 (June 1993) [hereinafter FM 100-5]; DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS v (Dec. 1994) [hereinafter FM 100-23]. OOTW includes the following types of activities: noncombatant evacuation operations; arms control; support to domestic civil authorities; humanitarian assistance and disaster relief; security assistance; nation assistance; support to counterdrug operations; combating terrorism; peacekeeping operations; peace enforcement; show of force; support for insurgencies and counterinsurgencies; and attacks and raids. FM 100-5, *supra* this note, at ch. 13. "Peace operations" are further divided in the following activities: support to diplomacy, which includes peacemaking, peace building, preventative diplomacy; peacekeeping, which includes observation and monitoring of truces and cease-fires; and peace enforcement, which includes restoration and maintenance of order and stability, protection of humanitarian assistance, guarantee and denial of movement, enforcement of sanctions, establishment and supervision of protected zones, and forcible separation of belligerents. FM 100-23, *supra* this note, at 2-12.

in environments where the host nation's governmental, judicial and police infrastructures have collapsed, or where the host nation could not be trusted to imprison civilians that threatened U.S. forces.[6] In many of these environments, no organization existed to accept the transfer of civilians detained by the military.[7] On top of that, no treaty or regulation existed on how to handle this dilemma.

In two of these operations, Restore Hope (Somalia, 1992-1994)[8] and Uphold Democracy (Haiti, 1994-1995),[9] the military continued to detain these civilians, becoming jailers for the host nation.[10] These civilians' extended stay in the custody of

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[6] *See* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, LAW AND MILITARY OPERATIONS IN HAITI 1994-1995, LESSONS LEARNED FOR JUDGE ADVOCATES 63 (11 December 1995) [hereinafter HAITI AAR]; F.M. Lorenz, *Law and Anarchy in Somalia,* PARAMETERS 27, 34 (Winter 1993-94) [hereinafter Lorenz].

[7] HAITI AAR, *supra* note 6, at 63; Lorenz, *supra* note 6, at 34.

[8] Operation Restore Hope was "a large-scale humanitarian intervention in Somalia," where the U.S. First Marine Expeditionary Force headed a combined task force consisting of forces from twenty nations. Lorenz, *supra* note 6, at 27. The task force became known as the Unified Task Force Somalia (UNITAF) and deployed in December, 1992. *Id.* On March 26, 1993, a United Nations (UN) force, the United Nations Operation in Somalia II (UNOSOM II), assumed command of Operation Restore Hope from UNITAF. KENNETH ALLARD, SOMALIA OPERATIONS: LESSONS LEARNED 18 (1995). UNOSOM II remained in Somalia until March 1994. *Id.* at 20.

[9] Operation Uphold Democracy was a semi-permissive entry of forces into Haiti to "use all necessary means to facilitate the departure from Haiti of the military leadership, . . . the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment, . . . " HAITI AAR, *supra* note 6, at 179, *quoting* UN Security Council Resolution 940, S.C. Res. 940, U.N. SCOR, 49th Sess., S/RES/940 (1994). The operation began on September 19, 1994 and ended on March 31, 1995 upon transfer of command to the United Nations Mission in Haiti (UNMIH). *Id.* at 18, 21.

[10] *Id.* at 63; Lorenz, *supra* note 6, at 34.

the U.S. military and United Nations (UN) forces prompted many questions from the media and human rights groups. These groups asked whether the detainees had been given rights common to prisoners in "all civilized countries."[11] They asked why the military had never formally charged the detainees with any crime,[12] why the detainees did not have access to retained legal counsel[13] or to their families,[14] what interrogation restrictions existed,[15] where were they being held,[16] when would they get a hearing and legal review of the grounds for their arrest,[17] and when and by whom would they be

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[11] Mark Huband, *UN Forces Deny Somali Detainees Legal Rights,* GUARDIAN, Sept. 25, 1993, at 14 [hereinafter Huband].

[12] Atkinson, *supra* note 3, at A20; Paul Watson, *Somali Boss's Detention Puts U.N. on Spot,* Sept. 23, 1993, at A16 [hereinafter Watson]; Huband, *supra* note 11, at 14; Richard Dowden, *UN Detainees 'Denied Rights'*, INDEPENDENT, Oct. 18, 1993, at 9 [hereinafter Dowden]; Richard Dowden, *UN "Fails to Meet Standards on Rights"*, INDEPENDENT, Jan. 26, 1994, at 11 [hereinafter Dowden II]; Dave Todd, *UN Failing Badly in Human Rights, Advocate Says; Amnesty International says Military Goals Taking Precedence,* OTTAWA CIT., Feb. 14, 1994 at A6 [hereinafter Todd]; Rohter, *supra* note 1, at A32; Gilbert A. Lewthwaite, *American Woman Accuses U.S. Troops in Haiti of Mistreating her Husband in Jail,* THE BALT. SUN, Oct. 17, 1994, at 3A [hereinafter Lewthwaite].

[13] Watson, *supra* note 12, at A16; Huband, *supra* note 11, at 14; Dowden, *supra* note 12, at 9; Dowden II, *supra* note 12, at 11; Rohter, *supra* note 1, at A32.

[14] Watson, *supra* note 12, at A16; Huband, *supra* note 11, at 14; Dowden, *supra* note 12, at 9; Dowden II, *supra* note 12, at 11; Lewthwaite, *supra* note 12, at 3A.

[15] Watson, *supra* note 12, at A16; Huband, *supra* note 11, at 14; Rohter, *supra* note 1, at A32; Lewthwaite, *supra* note 12, at 3A.

[16] Watson, *supra* note 12, at A16.

[17] Rohter, *supra* note 1, at A32.

tried.[18] These groups also brought world-wide attention to the maltreatment and torture of some of these civilians.[19], [20]

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[18] *Wrangle on Trial Plan,* DAILY TELEGRAPH, June 18, 1993, at 13; Watson, *supra* note 12, at A16; Dowden II, *supra* note 12, at 11; Todd, *supra* note 12, at A6.

[19] Private Elvin Kyle Brown, a Canadian soldier serving as part of UNOSOM II, was convicted in March, 1994 of the manslaughter and torture of a sixteen year old Somali detained by the Canadians for theft. Charles Trueheart, *Canadian Guilty of Killing Somali,* WASH. POST, March 18, 1994, at A24 [hereinafter Trueheart].

[20] UNOSOM II also detained civilians after assuming command of Operation Restore Hope in March, 1993. *Somalia, 1993 Annual Report of the International Committee of the Red Cross, in* UNITED NATIONS PEACE OPERATIONS, A COLLECTION OF PRIMARY DOCUMENTS AND READINGS GOVERNING THE CONDUCT OF MULTILATERAL PEACE OPERATIONS, 427 (Walter Gary Sharp, Sr., ed. 1996). Many observers criticism centered on UNOSOM II's treatment of the detainees, more so than on the U.S. forces' detainee treatment. It would appear logical therefore to be advocating uniform UN standards instead of, or in addition to, U.S. standards. The surge of UN directed or sponsored OOTW since the end of the Cold War supports this suggestion. For example, in 1993, six separate peace operations were conducted or authorized by the UN in the former Yugoslavia. *See* FM 100-23, *supra* note 5, at v. From 1945 to 1987, the UN launched thirteen peacekeeping operations. From 1987 to 1992, the UN established thirteen new operations, while at the same time continuing the prior ones. *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992,* U.N. GAOR, 47th Sess., Agenda Item 10, ¶ 47, U.N. Doc. A/47/277 S/24111 (1992). From January 1992 to January 1995, the UN launched eleven new operations. *Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations,* U.N. GAOR, 50th Sess., U.N. Doc. A/50/60 S/1995/1, ¶ 11 (1995).

These international uniform detainee procedures could take the form of a UN sponsored treaty. However, negotiating such a treaty would present many problems. These problems include the amount of time to negotiate and ratify such a treaty. For example, the International Covenant on Civil and Political Rights, G.A. Res. 2200 A [XXI], December 16, 1966, U.N. GAOR, 22d Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368, *entered into force for the United States* (with reservations) Sept. 8, 1992 [hereinafter International Covenant], took fourteen years to negotiate (1952-1966). *See* CHARLES S. RHYNE, THE SUBSTANCE, PROCESSES, PROCEDURES AND INSTITUTIONS FOR WORLD PEACE WITH JUSTICE 397 (1971) [hereinafter RHYNE]. It took the U.S. 26 more years to ratify it. *Multilateral Treaties Deposited with the Secretary-General,* United Nations, New York (ST/LEG/SER.E), as available on http://www.un.org/Depts/Treaty, on March 27, 1997 [hereinafter Treaties].

The military command in each operation developed ad hoc due process procedures for the civilian detainees. However, there were pronounced differences between the two sets of procedures. For example, in Operation Restore Hope, a unit commander, a captain, decided within 24 hours of arrest whether the civilian's detention would continue.[21] In Operation Uphold Democracy, it took days for the Multinational Force (MNF) commander, a major general, to make the same decision.[22] In Operation Uphold Democracy, a judge advocate interviewed the civilian within 72 hours of arrest, allowing the civilian to explain why continued detention was inappropriate.[23] No such interviews

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The International Covenant demonstrates another stumbling block to a UN sponsored treaty on detainee procedures. This treaty, ratified by the U.S., already covers many procedures on detainee due process. However, the U.S. refuses to enforce this treaty extraterritorially. *See* discussion *infra* Part I*B2b*; Richard M. Whitaker, *Civilian Protection Law in Military Operations: An Essay,* ARMY LAW., Nov. 1996, at 24 [hereinafter Whitaker]. This refusal to apply the International Covenant outside of the borders of the U.S. gives little incentive to the world's nations to convene once again to negotiate a new treaty on many of the same topics.

A more realistic proposal that would establish international procedures for detainees would be incorporating U.S. uniform detainee procedures into the UN Peacekeeping Operations Standard Operating Procedures. *See* HAITI AAR, *supra* note 6, at 70-71 n.238 (recommending to the Joint Uniform Lessons Learned System the "[t]he UN should establish a model set of guidelines for the establishment of a detention facility and then establish administrative and operational rules to ensure humane treatment of detainees. Further, the UN should create a working group to create and support the detention facility once it becomes operational."). That means, of course, that the U.S. must take the lead and develop procedures first.

[21] Message, Commander, Unified Task Force, to all Subordinate Commanders, subject: CUTF Commander's Policy Guidance #4 (Civilian Detainees), ¶ 4A (9 Feb. 1993) [hereinafter CUTF Policy].

[22] *See* HAITI AAR, *supra* note 6, at 71; Marc L. Warren, *Operational Law - A Concept Matures,* 152 MIL. L. REV. 60 (1996) [hereinafter Warren].

[23] *See* HAITI AAR, *supra* note 6 at 69-70.

occurred during Operation Restore Hope. The two sets of procedures that emerged from these operations bring more confusion than guidance for civilian detentions in future operations.

Despite the repeated after action report recommendations from both operations to develop uniform procedures for the treatment of civilian detainees in OOTW,[24] the Department of Army[25] has not yet done so. Four years after the conclusion of Operation Restore Hope, and two years after the conclusion of Operation Uphold Democracy, this issue remains a "legal vacuum."

Part II of this paper outlines reasons why the military needs to develop uniform detainee procedures to fill this legal vacuum. The current trend of worldwide ethnic conflict indicates that the U.S. will continue to embroil the military in OOTW. In many

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[24] *See* JOINT UNIVERSAL LESSONS LEARNED SYSTEM (JULLS) DATABASE, *Civilian Detainee Procedures*, JULLS No. 12747-45502, Unclassified, Version JM961, Washington D.C.: The Joint Staff/J7; HAITI AAR, *supra* note 6, at 71-72; U.S. ARMY CENTER FOR ARMY LESSONS LEARNED COMBINED ARMS ASSESSMENT TEAM PRELIMINARY IMPRESSIONS REPORT ON BOSNIA-HERZEGOVINA 29 (2 July 1993):

> The treatment and status of detained persons are recurring and developing issues in OOTW. . . . It will likely be encountered in future OOTW where US forces encounter hostile persons who are not lawful combatants. The concept is complicated by situations where no 'host nation' government is in existence, or where serious misconduct (such as the killing of a US forces soldier) is the basis for the detention. Little law or doctrine exists concerning the authority and procedures for the detention and trial of such persons. . . . DOD should develop doctrine concerning the definition and detention of detained persons.

[25] "The Secretary of the Army is the Department of Defense (DOD) Executive Agent for administering the DOD Enemy Prisoner of War (EPW) and Detainee Program." DEP'T

of these OOTW, the military will need to detain civilians again. The more the military detains civilians without guidance from a uniform set of procedures, the more the likelihood exists for the military to violate international law on detainee rights. The worst consequence of this violation is the threat of suit against the U.S., in its own federal courts, for detention practices that violate international law. The U.S. stands to lose both reputation and money with these claims. Furthermore, the U.S. risks condemnation from its own federal courts that recognize a Fifth Amendment due process right for aliens detained by the military outside of the territorial United States.

Uniform detainee procedures would also simplify the complicated international law on detainees into a cohesive body that the military can use for training and enforcement. These procedures can also help spokesperson deflect criticism from media and human rights groups, and help the U.S. instill respect for the rule of law in chaotic nations.

Part III of this paper proposes a set of uniform procedures to fill this "legal vacuum." There are few persuasive moral and legal arguments why civilians detained during OOTW should receive treatment that falls below the standards set by the Geneva Convention Relative to the Treatment of Prisoners of War (GPW).[26] However, civilians detained during OOTW are primarily criminal suspects, not prisoners of war (POWs).

OF ARMY, REGULATION 190-8, ENEMY PRISONERS OF WAR ADMINISTRATION, EMPLOYMENT, AND COMPENSATION ¶ 1-4a (1 June 1982) [hereinafter AR 190-8].

[26] Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (replacing the Geneva

Under international law, additional protections come into play for criminal suspects, such as due process procedures. These protections find no analogy in the GPW. The uniform procedures incorporate protections from the Geneva Conventions and international law on detainees into one cohesive body. By adopting these protections into a uniform standard, the U.S. will not be creating new law, but merely implementing existing legal standards.

The Appendix contains the proposed procedures tailored for inclusion into the *Department of Army Regulation 190-8, Enemy Prisoner of War Administration, Employment and Compensation* (1 June 1982) (*AR 190-8*).[27]

B. The Legal Vacuum

All the Geneva Conventions were written at a time when things were very clear-cut, . . . Either you were at war or you were not. This is an in-between situation.[28]

- Lieutenant Colonel Casey Warner, Staff Judge Advocate of the Multinational Force (MNF) during Operation Uphold Democracy

The issue of civilian detention during OOTW truly occurs in a legal vacuum. These detainees have no powerful treaty, like the GPW, to protect them. The Geneva

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Convention Relative to the Protection of Prisoners of War of 27 July 1929) (entered into force Oct. 21, 1950) [hereinafter GPW].

[27] AR 190-8, *supra* note 25.

[28] Rohter, *supra* note 1, at A32.

Conventions,[29] with the possible exception of Common Article 3,[30] simply do not apply to their situation. The U.S. is party to a few treaties that give detainees minimal protections from harm. However, it is not party to any treaty that gives them affirmative protections, such as those found under the GPW, or due process rights. Furthermore, U.S. military doctrine gives very little guidance on this subject.

1. The Legal Vacuum in the Geneva Conventions--

Before the end of the Cold War, the U.S. military found itself involved mainly in traditional military operations. A body of international law and custom, known as the "law of war," has evolved in an attempt to provide some degree of humanity to the conduct of these wars. It "comprises the body of rules and principles observed by civilized nations for the regulation of matters inherent in, or incidental to, the conduct of

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[29] The Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114 (replacing previous Geneva Wounded and Sick Conventions of 22 August 1864, 6 July 1906, and 27 July 1929 by virtue of art. 59) [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217 (replacing Hague Convention No. X of 18 October 1907, 36 Stat. 2371) [hereinafter GS]; Geneva Convention Relative to the Protection of Civilians in Time of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter GC], and the GPW, *supra* note 26.

[30] The term "Common Article" refers to provisions of the four Geneva Conventions which are identical to each Convention. Some of the common articles, e.g. articles two and three, are even numbered the same in all four Conventions. Others are worded virtually the same in each Convention, but are numbered differently, e.g. the article dealing with special agreements is article six in the GWS, *supra* note 29, at art. 6; the GS, *supra* note 29, at art. 6; and the GPW, *supra* note 26, at art. 6; but it is in article seven in the GC, *supra* note 29, at art. 7. These common articles generally deal with the Conventions' application and mechanics of their enforcement. Whitaker, *supra* note 20, at 10.

a public war; . . . "[31] At the heart of this "law of war" are the four Geneva Conventions, drafted in 1949, supplemented by Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)[32] and the Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of the Victims of Non-International Armed Conflicts (Protocol II).[33]

a. Common Article 2--

Common Article 2 applies the Conventions to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, . . ."[34] In other words, the Geneva Conventions apply only to international armed conflicts. Commonly known examples of Common Article 2 international armed conflicts include Korea,[35] Vietnam,[36] Falklands,[37] Operation Urgent Fury in Grenada,[38]

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[31] BLACK'S LAW DICTIONARY, 1583 (6th ed. 1990) [hereinafter BLACK'S].

[32] Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* at Berne, 12 Dec. 1977, U.N. Doc A.32.144 Annex I, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I]. The U.S. has not ratified this treaty. Treaties, *supra* note 20.

[33] Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of the Victims of Non-International Armed Conflicts, *opened for signature* at Berne, 12 Dec. 1977, U.N. Doc. A/32/144 Annex II, *reprinted in* 26 I.L.M. 561 (1987) [hereinafter Protocol II]. The U.S. has not ratified this treaty. Treaties, *supra* note 20.

[34] GPW, *supra* note 26, at art. 2.

[35] *See America's Most Recent Prisoner of War: The Warrant Officer Bobby Hall Incident*, ARMY LAW., Sept. 1996, at 3.

[36] *See* Vietnam, *supra* note 4, at 63.

Operation Just Cause in Panama,[39] and Operations Desert Shield and Desert Storm in the Persian Gulf.[40]

Since the ratification of the Geneva Conventions in 1955, the U.S. has become involved in a series of operations that did not fall within the Common Article 2 definition of international armed conflict. These operations stemmed from U.S. intervention in other countries' conflicts growing out of ethnic, religious, and tribal tensions.[41] Years of communist rule had suppressed these tensions, and the disappearance of the bipolar world structure subsequently unleashed them.[42] A rise in nationalism and fundamentalism accompanied the resurgence of these tensions.[43] Refugees, epidemics, poverty, population explosions, and water and food shortages exacerbated these

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[37] *See* James F. Gravelle, *The Falklands (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain,* 107 MIL. L. REV. 5 (1985).

[38] *See* Memorandum, HQDA, DAJA-JA, subject: Geneva Conventions Status of Enemy Personnel Captured During URGENT FURY (4 Nov. 1983).

[39] *See* Parkerson, *supra* note 4, at 31; U.S. v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992) ("However the government wishes to label it, what occurred in late 1989-early 1990 was clearly an 'armed conflict' within the meaning of article 2."). *But see* Warren, *supra* note 22, at 58 (asserting that Operation Just Cause was not a war under Common Article 2 because the U.S. forces were present at the invitation of the lawfully elected government of President Endara).

[40] *See* DEP'T OF DEFENSE, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (1992).

[41] *See* William A. Stofft and Gary L. Guertner, *Ethnic Conflict: The Perils of Military Intervention,* PARAMETERS 31 (Spring 1995) [hereinafter Stofft].

[42] *Id.*

[43] *Id.*

conflicts.[44] One commentator characterized the U.S. position in this emerging world situation as "a limousine surrounded by a mob going through an urban area."[45]

The U.S. took the lead, both on its own and as a member of UN-led coalitions, to intervene in many of these internal conflicts. It intervened in these conflicts not as a party, but in capacities such as peace enforcement.[46] These interventions, or OOTW, included Operation Provide Comfort in Iraq (1991),[47] Operation Restore Hope in Somalia (1992-1994),[48] Operation Able Sentry in Macedonia,[49] and Operation Uphold

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[44] FEDERAL DOCUMENT CLEARING HOUSE, INC., FDCH POLITICAL TRANSCRIPTS, COMMITTEE HEARING TO CONSIDER THE NOMINATION OF MADELEINE ALBRIGHT FOR SECRETARY OF STATE, 19, Jan. 8, 1997 [hereinafter Confirmation Hearings] at 40, 74.

[45] *Id.* at 74, *quoting* journalist Robert Kaplan.

[46] "PE [Peace enforcement] is the application of military force or the threat of its use, normally pursuant to international authorization, to compel compliance with generally accepted resolutions or sanctions. The purpose of PE is to maintain or restore peace and support diplomatic efforts to reach a long-term political settlement. . . . U.S. participation in Operation Restore Hope in Somalia in 1992-93 is an example of PE" as are Operations Provide Comfort in Northern Iraq, 1991; Joint Endeavor, Bosnia-Herzegovina, 1995-present; and Operation Uphold Democracy, Haiti, 1994-1995. Peace enforcement includes protection of humanitarian assistance, establishment and supervision of protected zones, enforcement of sanctions, forcible separation of belligerents, guarantee and denial of movement, and restoration and maintenance of order and stability. FM 100-23, *supra* note 5, at 6-12.

[47] *See* FM 100-23, *supra* note 5, at 10.

[48] *See supra* note 8.

[49] Operation Able Sentry was a UN sponsored preventative deployment mission in the former Yugoslav Republic of Macedonia. FM 100-23, *supra* note 5, at 59.

Democracy in Haiti (1994-1995),[50] and continue with Operation Joint Endeavor in Bosnia-Herzegovina (1995-present).[51]

Because these OOTW were not international armed conflicts as defined by Common Article 2, the Geneva Conventions (except for Common Article 3) did not apply. This includes the GPW, so persons captured or detained during an OOTW were not prisoners of war. They have been called "detainees."[52]

b. Common Article 3--

Common Article 3 applies "in case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[53] In other words, this Article is the only portion of the Geneva Conventions that applies to internal state

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[50] *See supra* note 9.

[51] Operation Joint Endeavor, 1995-present, involves the deployment of forces from 15 NATO nations to implement the Dayton Peace accords, an agreement which attempts to reconcile the conflicting claims and aspirations of the Muslim, Serb and Croat peoples of Bosnia-Herzegovina. U.S. troops are due to depart this Operation in June 1988. Dusko Doder, *Bosnia's False Peace; "Psychologically and Practically, All Sides are Preparing for War,"* March 16, 1997, at C07.

[52] *See* JOINT UNIVERSAL LESSONS LEARNED SYSTEM (JULLS) DATABASE, *Classification and Status of Detainees During Operation Restore Hope*, JULLS No. 10639-80895, Unclassified, Version JM961, Washington D.C.: The Joint Staff/J7, 1 May 1996 ("[R]eferences in operations orders (OPORDS) and other publications to 'enemy' or 'prisoners of war' are inappropriate. Personnel detained by US/UN forces for whatever reason are 'detainees,' . . ."); Warren, *supra* note 22, at 58.

[53] GPW, *supra* note 26, at art. 3.

conflicts. It mandates humane treatment for all "[p]ersons taking no active part in the hostilities, . . ."[54] It offers protection from:

> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (*b*) taking of hostages;
> (*c*) outrages upon personal dignity; in particular, humiliating and degrading treatment;
> (*d*) the passing of sentence and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[55]

It also requires that the "wounded and sick shall be collected and cared for."[56]

This Article was the first piece of globally accepted international law requiring a state to treat its own nationals according to international community standards.[57] It forms a basis for prosecution by the International Tribunal for Rwanda.[58]

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[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] David P. Forsythe, *Legal Management of Internal War: the 1977 Protocol on Non-International Armed Conflicts*, 72 A.J.I.L. 272, 274 (1978).

[58] S.C. Res. 955, U.N. SCOR, 49th Sess. 3453d mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994) *reprinted in* 33 I.L.M. 1598 (1994) [hereinafter Rwanda Statute] (establishing an international tribunal for the prosecution of war crimes committed in Rwanda). *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 A.J.I.L. 556 (1995) [hereinafter Atrocities].

However, Common Article 3 alone cannot adequately protect civilians detained during OOTW. It fails to elaborate upon precisely what conduct constitutes "violence to life and person," "cruel treatment," "torture," "outrages upon personal dignity," and "humiliating and degrading treatment." It falls far short of the treatment standards afforded POWs by the GPW.

Another reason that Common Article 3 inadequately protects detainees during OOTW is that this Article might not even apply to the conduct of the U.S. military in OOTW. Many commentators assert that Common Article 3 only applies to the conduct of parties to an internal conflict.[59] They maintain that the Article does not apply to the conduct of intervenors like the U.S.[60] They also assert that the Article does not apply to OOTW that do not involve armed conflict,[61] such as Operation Uphold Democracy.[62]

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[59] GPW, *supra* note 26, at art. 3 ("In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, *each Party to the conflict* shall be bound to apply, as a minimum, the following provisions: . . . ") (emphasis added); Steven J. Lepper, *The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis,* 18 HOUS. J. INT'L L. 395-96 (Winter 1996) [hereinafter Lepper] (The U.S., as an intervenor in another country's internal conflict, is not a party to that conflict and therefore Common Article 3 does not apply to the conduct of the American military in this case).

[60] *Id.*

[61] GPW, *supra* note 26, at art. 3 ("In the case of *armed conflict* . . .") (emphasis added). But many commentators assert that, because Common Article 3 is a part of customary international law, it applies to everyone at all times. Lepper, *supra* note 60, at 395-6 (stating that many commentators believe that Common Article 3 applies to U.S. military conduct in OOTW); U.S. ARMY LEGAL OPERATIONS, AFTER ACTION REPORT, OPERATION RESTORE HOPE, 5 DECEMBER 1992 - 5 MAY 1993 ¶ F2 (1993) [hereinafter Somalia Legal AAR], at (asserting that the U.S. military, even as a noncombatant, had an obligation under Common Article 3 to "investigate, arrest and detain where appropriate, those who commit crimes against humanity or willfully kill or torture protected persons.").

2. The Legal Vacuum in U.S. Law--

U.S. law, through its criminal statutes and through its international treaties, protects detainees in OOTW protection from harm. However, U.S. domestic law does not provide these detainees with any affirmative protections, such as due process protections or treatment standards that approach those enumerated in the GPW.

a. Criminal Statutes--

Several of the punitive articles of the Uniform Code of Military Justice (UCMJ), the criminal statute for U.S. soldiers, prohibit harmful conduct to others, to include detainees in OOTW. These articles prohibit the crimes of "cruelty and maltreatment,"[63] murder,[64] manslaughter,[65] rape,[66] maiming,[67] sodomy,[68] and assault[69] against detainees. One punitive article prohibits acts "to the prejudice of good order and discipline in the armed forces," or which "bring discredit upon the armed forces."[70] This article prohibits acts

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[62] *See supra* notes 5 and 46 and accompanying text.

[63] 10 U.S.C. § 893 (1995).

[64] 10 U.S.C. § 918 (1995).

[65] 10 U.S.C. § 919 (1995).

[66] 10 U.S.C. § 920 (1995).

[67] 10 U.S.C. § 924 (1995).

[68] 10 U.S.C. § 925 (1995).

[69] 10 U.S.C. § 928 (1995).

[70] 10 U.S.C. § 934 (1995).

such as indecent language, acts, and assault; and assault with intent to commit murder, voluntary manslaughter, rape, robbery, or sodomy.[71] These articles protect detainees in OOTW from many of those acts considered crimes under customary international law as well.[72]

b. International Treaties to which the U.S. is a Party--

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[71] *Id.*

[72] The U.S. is legally bound to adhere to customary international law, which "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 101(2)(1986) [hereinafter RESTATEMENT]. Customary international law affords detainees in OOTW protection from offenses based on Common Article 3 and from "crimes against humanity." *See* discussion *infra* Part I*B1*; Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 56-62 (Summer 1996) [hereinafter Newton]. "Crimes against humanity" include murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, or religious grounds, and other inhumane acts. Rwanda Statute, *supra* note 58, art. 5; UNITED NATIONS, REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 (1993), U.N. Doc S/25704 and Annex, art. 5 (May 3, 1993), *reprinted in* 32 I.L.M. 1159 (1993) [hereinafter Statute of the International Tribunal]. These categories of customary international law prohibitions govern conduct during all armed conflicts, both internal and international. Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L LAW 78, 85 (1995); Newton, *supra* this note, at 61. These crimes have provided, or are providing, the basis for prosecution of civilians by the international tribunal for the prosecution of war crimes in Rwanda and for the International Tribunal for the Prosecution of War Crimes in the Former Yugoslavia. Rwanda Statute, *supra* note 58, at art. 3; Statute of the International Tribunal, *supra* this note, at art. 5.

Protections granted detainees under customary international law, although vital, fail to provide detainees with the affirmative protections enumerated under the GPW, or with due process protections. "Crimes against humanity" generally include only massive, wide-spread offenses against a civilian population. Rwanda Statute, *supra* note 58, at art. 3; Statute of the International Tribunal, *supra* this note, at art. 5; Newton, *supra* this note, at 61. Detainees in OOTW should not have to wait until their captors commit these horrific crimes against many detainees before meriting prosecution.

The U.S. Constitution states that "all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[73] The U.S. is party to treaties that prohibit torture;[74] cruel, inhumane or degrading punishment or treatment;[75] and genocide.[76] These treaties' protections extend to the military's treatment of detainees during OOTW.[77]

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[73] U.S. CONST. art. VI, cl. 2.

[74] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, G.A. Res. 39/46, 38 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter Torture Convention]. This treaty came into force for the U.S. on November 20, 1994. As of March 27, 1997, 102 countries have ratified this treaty. Treaties, *supra* note 20. This Convention defines torture as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity. It does not include pain or suffering arising only from, inherent on or incidental to lawful sanctions.

Torture Convention, *supra* this note, at art. 1.

[75] *Id.* at art. 16. Although the treaty does not elaborate on what constitutes this kind of treatment, the Senate attached a reservation which states that "the United States considers itself bound by art. 16 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth amendments to the Constitution of the United States." 136 CONG. REC. S17486-01 at ¶ I(1) (daily ed., Oct. 27, 1990) [hereinafter S17486-01].

[76] Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 11, 1948, 78 U.N.T.S. 277 (1948) *reprinted in* 28 I.L.M. 779 [hereinafter Genocide Convention]. The U.S. ratified this Convention on November 25, 1988. As of March 27, 1997, 123 countries have ratified the Genocide Convention. Treaties, *supra* note 20. This Convention defines genocide as:

The protection these treaties offer to detainees is significant. For example, most assume that modern-day soldiers from "civilized" countries would never torture or maltreat detained civilians. However, soldiers from countries such as Canada,[78] the United Kingdom,[79] Israel,[80] and the U.S.[81] have done just that.

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[a]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group,

(b) Causing serious bodily or mental harm to members of the group,

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,

(d) Imposing measures intended to prevent births from within the group,

(e) Forcibly transferring children of the group to another group.

Genocide Convention, *supra* this note, at art. II.

[77] Torture Convention, *supra* note 74, at art. 5 ("Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: . . . (*b*) When the alleged offender is a national of that State; . . . "); 18 U.S.C. § 2340A(b) (West 1984 and Supp.) (Implementing legislation for art. 5 of the Torture Convention); Genocide Convention, *supra* note 76, at art. VI ("persons charged . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed."); 18 U.S.C. § 1091(d)(1995) (Implementing legislation for art. VI of the Genocide Convention, which also extends jurisdiction to American citizens who commit genocide outside the borders of the U.S.).

[78] On March 16, 1993, Canadian troops serving under UNOSOM II during Operation Restore Hope killed a 16 year old Somali detained on suspicion of theft. The Canadian troops kicked the Somali teen in the face and chest, pummeled him with truncheons and burned the soles of his feet with a lit cigar. He died of head wounds. At least a dozen soldiers witnessed the beating, and two posed for "trophy" photographs with the detainee. Witnesses heard the Somali's screams over the roar of an electric generator. Canadian witnesses within earshot, to include officers, did nothing to intervene. Canada compensated the teen's family with 100 camels worth about $11,000. Trueheart, *supra* note 19, at A24.

[79] Ireland v. United Kingdom, 2 Eur. Ct. H.R. (Ser. A) at 25 (1978) (Subjecting detainees to hooding, sleep deprivation, wall-standing and food deprivation constitute "inhuman and degrading treatment" which cannot be tolerated even under a state of emergency).

[80] U.P.I., INTERNATIONAL, Nov. 15, 1996 (Israeli High Court of Justice approves of the use of physical force during interrogation of an Islamic extremist on the grounds that he is withholding information about a possible attack. U.N. spokesman states that "Israel ratified the convention against torture, and it effectively committed itself not to conduct itself in a way which could be characterized as either torture or cruel or inhumane punishment. Yet it has now embedded in its law provisions which in our view will inevitably lead to agents of Israel breaching the convention against torture.").

[81] During Operation Uphold Democracy, some observers objected to the Military Intelligence (MI) soldiers practicing interrogation techniques labeled the "pride" and "ego down" approaches. HAITI AAR, *supra* note 6, at 60 n.188; DEP'T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATIONS, App. (1989). The interrogation approaches consisted of attacking the detainees' sense of personal worth and goading them into becoming defensive to the point where they render the desired information in an effort to convince the interrogators that they are wrong. *Id.* It often involved use of offensive and insulting language during interrogations, as well as throwing things around the interrogation booth. Captain Warren Reardon, Recorder for the Haiti After Action Review Conference in Charlottesville, VA, (May 9, 1995) [hereinafter Reardon Notes]. There was also some objections over altering the feeding and sleeping patterns of certain detainees in order to obtain information. Then-Captain Peter Becker, the judge advocate advising the MI units during Operation Uphold Democracy, came up with the idea of feeding certain detainees scalloped potatoes from the Army's Meals-Ready-to-Eat (MRE) until they rendered the desired information. "The idea was to make detention less comfortable for those who were uncooperative, and use thousands of containers of scalloped potatoes." Interview with Major Peter Becker (March 24, 1997) [hereinafter Interview with Major Becker]. Any American soldier who has eaten this particular MRE entree can testify that, while this meal is certainly not dangerous to one's health, it is not very palatable, thus explaining the ample supply of scalloped potatoes available for the detainees. *See also* Lewthwaite, *supra* note 12, at 3A (alleging that U.S. interrogators disturbed a detainee's sleeping patterns in order to obtain information).

While these interrogation practices pale in comparison to many of the atrocities committed by other nations against their detainees, the practices do not meet the GPW interrogation standard. Article 17 of the GPW states that "[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." GPW, *supra* note 26, at art. 17. Major Becker believes that applying the GPW standard to interrogations in the OOTW setting, where it does not apply, undermines the MI interrogators' effectiveness. Interview with Major Becker, *supra* this note.

A plausible argument can be made that these interrogators' conduct constituted "acts of cruel, inhuman or degrading treatment or punishment" under the Torture Convention. Torture Convention, *supra* note 74, at art. 1. The Senate attached a reservation to the Torture Convention which stated "[t]hat the United States considers itself bound by art.

While these treaties protect detainees from harm, the U.S. does not consider itself bound to any international treaty that provides detainees in OOTW with any affirmative treatment standards. These affirmative treatment standards include those found in the GPW or due process procedures. In two instances, the U.S. has come close to legally binding itself to a fairly high standard of detainee treatment. These two instances involved the American Convention on Human Rights (American Convention)[82] and the International Covenant on Civil and Political Rights (International Covenant).[83] These treaties provide significant treatment and due process protections to detainees. The U.S. has signed both treaties, and has even ratified the latter. Nevertheless, it officially maintains that neither of these treaties apply to the conduct of the military toward civilians detained during OOTW.

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16 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth amendments to the Constitution of the United States." S17486-01, *supra* note 75, at ¶ I(1). This conduct could be interpreted as a violation of the Fifth amendment's proscription against self-incrimination, or as "cruel and unusual punishments" under the Eighth amendment. U.S. CONST. amends. V and VIII.

[82] American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, OEA/Ser.L./V/II.23 doc. rev. 2, *entered into force* July 18, 1978 [hereinafter American Convention].

[83] International Covenant, *supra* note 20.

President Carter signed the American Convention in 1977.[84] While the U.S. never ratified this treaty,[85] 25 states were party to it as of January 1997.[86] This treaty provides that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. . . . All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."[87] This treaty also provides detainees with substantial due process protections. It forbids discrimination on the basis of "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."[88] It also forbids arbitrary imprisonment.[89] In particular, it mandates that detainees be informed of the reasons for their detention,[90] be promptly notified of the charges against them,[91] "be brought promptly before a judge or other officer authorized by law to exercise judicial power,"[92] "be entitled to trial within a reasonable time",[93] and be entitled to petition for *habeus corpus*.[94] It also allows parties

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[84] Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1, 46 n.185 [hereinafter Stirling].

[85] Treaties, *supra* note 20.

[86] *Recent Actions Regarding Treaties to which the U.S. is not a Party, January 1997: Status of Inter-American Human Rights Agreements*, 36 I.L.M. 229 (1997).

[87] American Convention, *supra* note 82, at art. 5(2).

[88] *Id.* at art. 1(1).

[89] *Id.* at art. 7(3).

[90] *Id.* at art. 7(4).

[91] *Id.*

[92] *Id.* at art. 7(5).

[93] *Id.*

to the Convention to deviate from granting some of these protections "[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party."[95] States may eliminate or alter detainees' due process protections under these emergency conditions, but only "to the extent and for the time period strictly required by the exigencies of the situation."[96] However, even during these emergencies, party states may not subject anyone to measures "inconsistent with its other obligations under international law," or "discrimination on the ground of face, color, sex, language, religion, or social origin."[97] Nor do these emergencies permit states to subject detainees to "torture or cruel, inhuman or degrading punishment or treatment."[98]

This Convention reestablishes the Inter-American Commission on Human Rights, originally created by the Organization of American States.[99] The Commission's function is to "promote respect for and defense of human rights" by investigating member states' allegations of Convention violations and making recommendations to governments with

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[94] *Id.* at art. 7(6).

[95] *Id.* at art. 27(1).

[96] *Id.* at arts. 27(1) and (2).

[97] *Id.*

[98] *Id.*

[99] JOSEPH M. SWEENEY, COVEY T. OLIVER, NOYES E. LEECH, CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM, THIRD EDITION 718 (1988) [hereinafter Casebook].

respect thereto.[100] In addition, the Convention also establishes the Inter-American Court of Human Rights.[101]

The Senate never ratified this treaty.[102] In June 1993, the Clinton Administration announced plans to resubmit this treaty to the Senate,[103] but the treaty had not even made it out of the State Department as of April 1994.[104]

The second treaty that gives detainees substantial rights, which the U.S. has both signed and ratified, is the International Covenant on Civil and Political Rights (International Covenant).[105] The U.N. General Assembly adopted this treaty in 1966.[106]

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[100] American Convention, *supra* note 82, at arts. 34-51.

[101] *Id.* at arts. 52-69.

[102] Signature alone of a treaty, without ratification, "is normally *ad referendum*, *i.e.*, subject to later ratification, and has no binding effect but is deemed to represent political approval and at least a moral obligation not to defeat the object and purpose of the treaty after signature." RESTATEMENT, *supra* note 72, § 312, Comment *d.*

[103] FEDERAL DOCUMENT CLEARING HOUSE, INC., FDCH POLITICAL TRANSCRIPTS, SENATE SELECT COMMITTEE ON INTELLIGENCE HEARINGS ON "THE LIKELY IMPACTS OF PASSAGE OR DEFEAT OF NAFTA," November 4, 1993, at 20.

[104] FEDERAL DOCUMENT CLEARING HOUSE, INC., FDCH POLITICAL TRANSCRIPTS, TESTIMONY OF JOHN SHATTUCK, BUREAU OF HUMAN RIGHTS AND HUMANITARIAN AFFAIRS, DEPARTMENT OF STATE, BEFORE THE HOUSE APPROPRIATIONS COMMITTEE, April 21, 1994, at 6.

[105] International Covenant, *supra* note 20.

[106] ENCYCLOPEDIA OF HUMAN RIGHTS 943 (Edward H. Lawson, ed.) (1991) [hereinafter ENCYCLOPEDIA].

The U.S. ratified it on June 1, 1992. [107] As of January 1997, this treaty had 58 signatories and 136 parties.[108]

The International Covenant provides detainees with several protections. Like Common Article 3 and the American Convention, it provides detainees with protection from "torture and cruel, inhuman or degrading treatment or punishment." [109] Also like the other two treaties, it fails to define precisely what this term means (besides freedom from nonconsensual medical or scientific experimentation). It continues with the statement that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[110] Also like the American Convention, this treaty provides detainees in OOTW with substantial due process protections. It prohibits discrimination "of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[111] It also forbids arbitrary detention.[112] In particular, it mandates that detainees

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[107] Treaties, *supra* note 20.

[108] *Id.*

[109] International Covenant, *supra* note 20, at art. 7. In an effort to clarify this phrase, the U.S. attached a reservation similar to what it attached to the Torture Convention, "[t]hat the United States considers itself bound by art. 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth amendments to the Constitution of the United States." 138 CONG. REC. S4781-01 (daily ed., April 2, 1992), at ¶ I(3) [hereinafter S4781-01].

[110] International Covenant, *supra* note 20, at art. 10.

[111] *Id.* at art. 2(1).

[112] *Id.* at art. 9(1).

be promptly informed of the reasons for arrest,[113] be "brought promptly before a judge or other officer authorized by law to exercise judicial powers,"[114] "be entitled to trial within a reasonable time or to release,"[115] be able to petition for *habeus corpus*,[116] and receive an "enforceable right to compensation" for unlawful detention.[117] Like the American Convention, it provides for deviation from the due process protections "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed."[118] Party states may alter the due process protections only "to the extent strictly required by the exigencies of the situation, . . ."[119] Even in an emergency, these measures must never "involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."[120]

It would seem that if the U.S. has ratified this treaty, there is little of the "legal vacuum" of detainee rights that remains to be filled. With some clarification, this treaty's provisions provide the much-needed uniform detainee procedures. This treaty does not apply to detainees in OOTW because, first, the declaration attached to the treaty

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[113] *Id.* at art. 9(2).

[114] *Id.* at art. 9(3).

[115] *Id.*

[116] *Id.* at art. 9(4).

[117] *Id.* at art. 9(5).

[118] *Id.* at art. 4.

[119] *Id.*

[120] *Id.*

states that the treaty is non self-executing, and because, secondly, the State Department interprets this treaty to have no extraterritorial application. With these two conditions, it is uncertain whether this treaty has any legal effect within the U.S., much less outside of the U.S. toward noncitizens.

President Bush, based on advice from the U.S. Senate, ratified the International Covenant subject to a declaration that that the U.S. does not consider it to be self-executing.[121] In other words, the treaty requires implementing congressional legislation before its provisions can take effect.[122] This declaration permits Congress to decide exactly how to implement the treaty. Also, President Bush added this declaration also in an effort "to clarify that the Covenant will not create a private cause of action in U.S. courts."[123] Some commentators state that declaration in effect nullifies the entire treaty absent Congressional action.[124] As of March 1997, Congress had not passed legislation to implement the due process procedures found in the Covenant, to include any provisions concerning the treatment of detainees in OOTW.

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[121] *See* Whitaker, *supra* note 20, at 21.

[122] *Id.*

[123] David Hefferman, *America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law*, 45 CATH. U. L. REV. 481, 484 (Winter 1996) [hereinafter Hefferman].

[124] *Id.* at 483 n.10 (describing how the various limitations placed on ratification of the International Covenant, chiefly the non self-executing declaration, "were so extensive that some human rights lawyers, who had long campaigned for United States ratification of the treaty, suggested that continued non-ratification might have been preferable.").

The fact that treaty is not self-executing does not necessarily mean that the treaty does not govern military conduct in OOTW. The Department of State's view is that, as a non self-executing treaty, it binds the U.S. to adhere to only those terms that mirror customary international law.[125] That would mean that the treaty's provisions on the detainees' right to know the reason for detention and the right to a hearing would be enforceable, but not the right to compensation if wrongfully detained.[126]

Even if this treaty were self-executing, it still would not apply to the conduct of U.S. military toward detainees in OOTW. The State Department's official position on the International Covenant is that its provisions do not apply outside the U.S.[127] The rule is that international agreements bind parties with respect to their conduct that occurs within that party's territory, absent a different intention manifested within the treaty.[128] Generally, the intent behind a human rights treaty is to protect nationals from their own government, not from outside governments.[129] The language of Article 2 of the Covenant states that the Covenant's provisions apply to those who are both "within its territory *and* subject to its jurisdiction [italics added]," at the same time. If the drafters had intended the Covenant applied outside the party state, they would have substituted the word "or"

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[125] *See* Whitaker, *supra* note 20, at 22.

[126] *Id.* at 25.

[127] *Id.* at 24.

[128] RESTATEMENT, *supra* note 72, at § 322.

[129] *See* Whitaker, *supra* note 20, at 23.

for the word "and" in this clause.[130] Documentation provided to the Senate during the ratification process indicated that the treaty would not have extraterritorial effect.[131] Because the U.S. interprets this treaty to have no extraterritorial application, detainees in OOTW lose its due process protections.

Despite the State Department's position on the treaty's non-extraterritorial application, a plausible argument exists to the contrary. Some commentators read the treaty's scope provision to mean that it applies both "to all individuals within its territory" *and* also "to all individuals subject to its jurisdiction."[132] Although it is debatable whether all host nation civilians in an OOTW theater would be "subject to" U.S. "jurisdiction," those civilians in a detention facility operated by the military arguably fall under this "jurisdiction."[133] This interpretation would oblige the U.S. to grant all of the Covenant's due process protections to detained civilians in OOTW, to include the habeus corpus right and the enforceable right to compensation.

However, using the International Covenant as a basis for uniform detainee procedures is risky given the State Department's interpretation of this treaty's application. Under this interpretation, this treaty imposes no more upon the U.S. than what the Constitution

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[130] *Id.* at 24.

[131] *Id.*

[132] *Id.*; RESTATEMENT, *supra* note 72, at § 322, Reporter's Note 3 (stating that the International Covenant has extraterritorial application).

[133] *See* Whitaker, *supra* note 20, at 25.

already requires. At best, this treaty is persuasive evidence of customary international law, but not evidence of a binding obligation upon the U.S.

3. The Legal Vacuum in U.S. Military Doctrine--

The confusion in the military over how to define the term "detainee" reflects the confusion in the military over how to treat detainees. The term has no single, agreed-upon definition. One of the standard dictionaries defines it as "a person (as an enemy alien) held in custody for political reasons."[134] Some commentators have defined this term to include everyone deprived of liberty, except those incarcerated as the result of a conviction.[135] *AR 190-8* defines it as "[a] person who is an EPW [enemy prisoner of war] or RP [retained person][136] taken into custody against his or her will."[137] This definition excludes persons captured during OOTW. According to the most accepted military

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[134] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED, 616 (Philip Babcock Gove, ed., 1969).

[135] Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988) [hereinafter Body of Principles] at "Use of Terms" ("'Detained person' means any person deprived of personal liberty except as a result of conviction for an offence.").

[136]

> Article 33. Members of the medical personnel and chaplains while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of the present Convention, and shall also be granted all facilities necessary to provide for the medical care of , and religious ministration to prisoners of war.

GPW, *supra* note 26, at art. 33.

[137] AR 190-8, *supra* note 25, at 31.

definition, the term "detainee" is "[a] term used to refer to any person captured or otherwise detained by an armed force."[138] This includes prisoners of war,[139] retained

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[138] DEP'T OF DEFENSE, JOINT CHIEFS OF STAFF PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, 115 (23 March 1994) [hereinafter JCS Pub 1-02].

[139]

Article 4.

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Member of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such forces.

(2) Member of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operation in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(*a*) that of being commanded by a person responsible for his subordinates;

(*b*) that of having a fixed distinctive sign recognizable at a distance;

(*c*) that of carrying arms openly;

(*d*) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants o f a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of he occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while

personnel,[140] civilian internees,[141] civilians captured during international armed conflicts who do not fit the GPW definition of prisoner of war,[142] and civilians captured during OOTW.

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hostilities were going on outside the territory it occupies, in particular where such person have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present article, who have been received by neutral or non-belligerent Powers on their territory and who these Powers are required to intern under international law, without prejudice to anymore favourable treatment which these Powers may choose to given and with the exception of articles 8, 10, 15, 30, fifth paragraph 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these person depend shall be allowed to perform toward them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties. . . .

Article 5. The present Convention shall apply to the persons referred to in Article 4 form the time they fall into the power of the enemy and until their final release and repatriation.

GPW, *supra* note 26, at arts. 4, 5.

[140] *See supra* note 136; GPW, *supra* note 26, at art. 33.

[141] A civilian internee is one who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power. JCS Pub 1-02, *supra* note 138, at 68.

[142] While there is little guidance on how to handle detainees in OOTW, there is also little guidance on how to handle civilians captured during war who do not qualify as a prisoner of war. The GPW states that these persons' status should be determined by a "competent tribunal," but says nothing about what is to happen after that. GPW, *supra* note 26, at art. 5. The Uniform Code of Military Justice (UCMJ) provides for jurisdiction "in time of war" over persons who aid or attempt to aid the enemy, or who are found acting as a spies. 18 U.S.C. § 904 and 906 (1995). Military doctrine states that persons who are not members of the enemy force, or otherwise qualify for POW status under the GPW, but nonetheless "who take up arms and commit hostile acts, . . . may be tried and sentenced to execution or imprisonment." DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, ¶ 80 (July 1956). Protocol I to the Geneva Conventions states that

Military doctrine offers little guidance on how to treat detainees. Detention facility planners had few resources to turn to during Operations Restore Hope and Uphold Democracy. One source of military policy guidance available during these operations was the *Department of Defense Directive 5100.7, "DOD Law of War Program."*[143] This *Directive* requires all U.S. forces to abide by the "law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized."[144] Although this *Directive* appears to mandate compliance with the law of war during all OOTW, it is actually inapplicable to OOTW that do not involve "armed

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captured civilians that do not qualify for POW status may be tried by "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure" for commission of "war crimes or crimes against humanity" or a "penal offense related to the armed conflict." Protocol I, *supra* note 32, at art. 75. However, Protocol I cannot grant the U.S. power to try these civilians because the U.S. has not ratified this Protocol. Treaties, *supra* note 20.

During the Vietnam War, the U.S. military handed civilians, detained for posing a threat to the safety of the force, over to South Vietnam. Vietnam, *supra* note 4, at 24. Before handing them over, however, the U.S. military's Combined Military Interrogation Center could detain these civilians for up to four months for interrogation, or longer with approval from the Military Assistance Command, Vietnam. HEADQUARTERS, UNITED STATES MILITARY ASSISTANCE COMMAND, VIETNAM, DIRECTIVE NUMBER 381-11, EXPLOITATION OF HUMAN SOURCES AND CAPTURED DOCUMENTS, ¶ 5(a)(7) (5 August 1968), *reprinted in id.* at 127. During Operation Just Cause, the U.S. military detained hundreds of civilians. *See* Parkerson, *supra* note 4, at 68. Some of these civilians presented a security threat to the U.S. forces, such as former officials of the Noriega government. *Id.* Other civilians, to include journalists and trade union leaders, seemed to have been detained based solely because their views "were at odds with the new government" according to an Americas Watch report. *Id.* The U.S. also detained a number of persons based on drug-related activities. *Id.* Human rights groups criticized the U.S. for continuing to detain these persons even after any security threat they posed had passed. *Id.*

[143] DEP'T OF DEFENSE, DIR. 5100.7, DOD LAW OF WAR PROGRAM (July 10, 1979).

[144] *Id.* at D.1, E.1a(3).

conflict."[145] Nevertheless, the military has sought to comply with the spirit of the *Directive's* mandate, adhering to the law of war in OOTW as much as possible.[146] Other military sources of guidance available during this time frame included *AR 190-8.* This regulation requires that all persons detained "during the course of conflict" be given "humanitarian care and treatment."[147] The phrase "during the course of conflict" excludes persons detained during some OOTW from the purview of this regulation.[148] Other military policy sources available during this time frame included the *Department of Army, Field Manual 19-40, "Enemy Prisoners of War, Civilian Internees, and Detained Persons" (February 1976).*[149] This *Manual,* which is also still in effect, offers detailed guidance on detaining host nation civilians. It applies the treatment standards listed in *AR 190-8* to civilians captured by U.S. forces while assisting a host nation in internal defense and development operations, which have since then become a form of OOTW.[150] However, the *Manual* presupposes a functioning and trustworthy host nation police force that accepts the transfer of civilians detained by the U.S.,[151] which has not always been the case.

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[145] Whitaker, *supra* note 20, at 4 n.13.

[146] *Id.*

[147] AR 190-8, *supra* note 25, at ¶ 1-5.

[148] *Id.*

[149] DEP'T OF ARMY, FIELD MANUAL 19-40, ENEMY PRISONERS OF WAR, CIVILIAN INTERNEES, AND DETAINED PERSONS (Feb. 1976) [hereinafter FM 19-40].

[150] *Id.* at ch. 4; FM 100-5, *supra* note 5, at 13-8.

[151] FM 19-40, *supra* note 149, at ch 4.

New doctrinal publications indicate that the military is slowly recognizing civilian detention as an issue in OOTW. The *Department of Defense Directive 2310.1, Department of Defense Program for Enemy Prisoners of War, (18 August 1994)* includes "those persons held during operations other than war" in its definition of "detainees."[152] The *Joint Task Force Commander's Handbook for Peace Operations (28 February 1995)* (currently under revision)[153] and the *Joint Publication 3-07, Joint Doctrine for Military Operations Other Than War (16 June 1995)*[154] mention "detained civilians" as an "additional legal consideration" and a "unique legal issue" in peace operations.[155] The *Department of Army, Field Manual 19-1, Military Support to Joint, Multinational, and Interagency Operations (Initial Draft, 15 December 1996)* begins to delve into the Military Police soldier's expanded role in OOTW.[156] This *Manual* changes the name of the Enemy Prisoner of War/Civilian Internee (EPW/CI) military police battalions, responsible for operating prisoner of war camps, to Internment and Resettlement

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[152] DEP'T OF DEFENSE, DIRECTIVE 2310.1, DEPARTMENT OF DEFENSE PROGRAM FOR ENEMY PRISONERS OF WAR (EPOW) ¶ A.1. (18 Aug. 1994).

[153] JOINT WARFIGHTING CENTER, JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS (28 February 1995)(currently under revision) [hereinafter JTF Peace Operations].

[154] JOINT CHIEFS OF STAFF, PUB 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR (16 June 1995)[hereinafter JCS Pub 3-07].

[155] JTF Peace Operations, *supra* note 153, at 79; JCS Pub 3-07, *supra* note 154, at IV-8, 9.

[156] DEP'T OF ARMY, FIELD MANUAL 19-1, MILITARY POLICE SUPPORT TO JOINT, MULTINATIONAL, AND INTERAGENCY OPERATIONS (DRAFT) (Initial Draft 15 December 1996) [hereinafter Draft FM 19-1].

battalions.[157] This name change reflects these battalions' added duties of safeguarding, accounting for, supporting and providing proper and humane treatment for "criminal detainees" in OOTW.[158]

Nevertheless, the issue of detained civilians in OOTW is absent from a number of recently published military regulations that address OOTW issues.[159] The military has no plans to develop a detailed analysis of civilian detainee treatment in any future doctrinal publication.

II. Arguments in Favor of Uniform Procedures

The detainee treatment and due process procedures developed by the military in Operations Restore Hope and Uphold Democracy seemed to work. The U.S. military had treated the detainees humanely and provided them with a fair amount of due process protections. On the surface, there seems to be no reason to change the current practice of developing detainee procedures *ad hoc* as the need arises.

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[157] *Id.* at 6-19.

[158] *Id.* at 6-20.

[159] FM 100-23, *supra* note 5; CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 3290.01, PROGRAM FOR ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES, AND OTHER DETAINED PERSONNEL (20 March 1996); DEP'T OF ARMY, FIELD MANUAL 100-20, STABILITY AND SUPPORT OPERATIONS (April 1996) (Draft) [hereinafter Draft FM 100-20].

However, this practice of developing new detainee procedures upon demand is like driving with one's eyes closed. Disaster is inevitable. Military detainee treatment that strays from international law standards exposes the U.S. to liability. This is especially relevant because neither Operation Restore Hope's nor Operation Uphold Democracy's detainee procedures completely incorporated the international law on detainees. The U.S. stands to lose both reputation and money for claims based on violations of international law on detainees. It also risks condemnation from its federal courts that recognize a Fifth Amendment due process right for aliens detained by the military outside of the territorial United States.

Uniform detainee procedures would also simplify the complicated international law on detainees into a cohesive body that the military can use for training and enforcement. These procedures would enable the military to train soldiers to operate detainee facilities in future OOTW. They would also enable military representatives to clearly justify detainee policies to the media and human rights groups. Lastly, and perhaps most importantly, uniform procedures would contribute towards U.S. leadership in promoting human rights and the rule of law. The U.S. can choose to continue its practice of reacting to the problem of civilian detainees in OOTW, or it can take the lead and set standards in this area that other nations might emulate. The benefits of becoming a leader in this area far outweigh the risks of continuing with the status quo.

A. The U.S. will need to detain civilians again

[W]e have to resist those who believe that now that the Cold War is over, the United States can completely return to focusing on problems within out borders and basically ignore those beyond our borders. That escapism is not available to us because at the end of the Cold War, America truly is the world's indispensable nation. There are times when only America can make the difference between war and peace, between freedom and repression, between hope and fear. We cannot and should not try to be the world's policeman. But where our interests and values are clearly at stake, and where we can make a difference, we must act and lead. We must lead in two ways: First, by meeting the immediate challenges to our interests from rogue regimes; from sudden explosions of ethnic and religious and tribal hatreds; from short-term crises; and second, by making long-term investments in security, prosperity, peace, and freedom that can prevent these problems from arising in the first place, and that will help all of us to fully seize the opportunities of the 21st century. We have approached the immediate challenges with strength and flexibility, working with others when we can, alone when we must, using diplomacy where possible and force where necessary.

-President Bill Clinton[160]

The U.S. will need to detain civilians again during the conduct of its future OOTW. The more often the military detains civilians without a set of procedures for guidance, the higher the probability that the military will violate international law on detainee rights.

Recent statements from U.S. policy makers indicate a cautious willingness to have U.S. forces intervene in ethnic, religious and tribal conflicts around the world where American interests may be affected. Although regional ethnic conflicts rarely threaten domestic security interests directly, the U.S. has nevertheless deployed its forces

[160] President Bill Clinton, *The Legacy of America's Leadership As We Enter the 21st Century*, U.S. DEP'T OF STATE DISPATCH 517 (October 21, 1996) [hereinafter Clinton] (address to the people of Detroit, Michigan, October 22, 1996).

worldwide with increasing frequency.[161] As Secretary of State Madeleine Albright emphasized in her confirmation hearing:

> We are not a charity or fire department. We must be selective and disciplined in what we agree to do. Despite this, we also recognize that our interests and those of our allies may be affected by regional or civil wars, power vacuums that create targets of opportunity for criminals or terrorists, dire humanitarian emergencies, and threats to democracy.[162]

As the only remaining world superpower,[163] the U.S. can find plenty of reasons to intervene militarily in these internal state conflicts. American economic or national interests may be at stake.[164] The U.S. may have little choice but to be drawn into a global manifestation of these ethnic conflicts, just as ethnic conflicts drew the U.S. into World Wars I and II.[165] Threat of crime and the stress on the American welfare system posed by

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[161] Newton, *supra* note 72, at 3; Stofft, *supra* note 41, at 37.

[162] Confirmation Hearings, *supra* note 44, at 19.

[163] *Id.* ("Because we have unique capabilities and unmatched power, it is natural that others turn to us in time of emergency. . . . where our interests are clear, our values are at stake and where we can make a difference, we must act, and we must lead."); Clinton, *supra* note 160, at 517; Stofft, *supra* note 41, at 37.

[164] *See* Ralph Peters, *The Culture of Future Conflict*, 23 PARAMETERS (Winter 1995-96) ("We are entering the century of 'not enough,' and we will bleed for things we previously could buy."); Confirmation Hearings, *supra* note 44, at 39 ("The U.S. vital national interests where we would commit force, if necessary, have to do with the protection of our territory, our people, our economic lifeline and our way of life and those of our allies. There one should not hesitate to use a mixture of force and diplomacy, and our military are trained better than any other military in the world to undertake that kind of action.").

[165]

refugees fleeing to the U.S. has spurred previous American intervention in other nations' internal conflicts. For example, the U.S. intervened in Haiti, in Operation Uphold Democracy, in part to stem the torrent of refugees attempting to make the dangerous journey through the Caribbean to the U.S. in makeshift boats.[166] Finally, Americans may intervene out of a sense of moral duty.[167]

> The demise of European communism and the Russian empire has unleashed this century's third wave of ethnic nationalism and conflict. The first, in the wake of the collapsing Ottoman, Russian, and Austro-Hungarian empires, came to a climax after World War I; the second followed the end of European colonialism after World War II. The third wave of ethnic-based conflict may transform international politics and confront the United States with new security challenges.

Stofft, *supra* note 41, at 31.

[166] Between 1981 and 1991, the United States interdicted approximately 25,000 Haitians from "overcrowded, unseaworthy boats" fleeing Haiti to the U.S. out of fear of political persecution. From October 1991, shortly after the coup which overthrew Haiti's first democratically elected president, to March 1993, the U.S. interdicted approximately 35,500 Haitians. Haitians Centers Council, Inc. v. Sale, 823 F.Supp. 1028, 1034-5 (E.D.N.Y. 1993). President Clinton, in a live broadcast to the nation before Operation Uphold Democracy, stated that "Three hundred thousand more Haitians, five percent of their entire population, are in hiding in their own country. If we don't act, they could be the next wave of refugees at our door." President Clinton, Address Broadcast Live to the Nation (Sept. 15, 1994), *reprinted in* WASH POST, Sept. 16, 1994, at A31, *reprinted in* HAITI AAR, *supra* note 6, at 7n.17.

As of this writing, Italy prepares for military intervention in Albania's civil war in response to the overwhelming number of Albanian refugees flocking to Italian ports since Albania's civil strife began. *Italy Plans Military Action in Albania,* THE DAILY TELEGRAPH, March 21, 1997, at 18.

[167] *See* Stofft, *supra* note 41, at 37 (describing how T.V. has heightened Americans' moral sensitivity "when ethnic violence and human suffering are on display in our living room every night, . . .").

Since 1988, the military's participation in OOTW has increased dramatically.[168] This trend looks as if it will continue. In November 1996, U.S. policy makers were one step away from sending the military to Zaire.[169] These troops would have provided aid to the flood of refugees fleeing to Rwanda as a result of a threatened governmental overthrow by rebels.[170] Had this operation actually occurred, military troops probably would have needed to detain civilians for force security. Because the Zairian government cannot protect its own citizens from these rebels, it probably cannot protect intervening forces from harm, either. Policy makers planned this OOTW even while military troops were still involved in Operation Joint Endeavor in Bosnia-Herzegovina. In Operation Joint Endeavor in Bosnia-Herzegovina, the political leaders have decided the military forces involved would not detain civilians for prolonged time periods.[171] However, these military forces face ever-increasing world-wide pressure to arrest and detain war criminals indicted by the International Tribunal for the Former Yugoslavia.[172] The U.S.

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[168] FM 100-23, *supra* note 5, at iv and v.

[169] James C. McKinley, Jr., *Exodus in Zaire: UN Faces a New Refugee Crisis,* N.Y.TIMES, Mar. 3, 1997, at A3.

[170] The operation was called off when refugees began returning to Rwanda on their own. *Id.* As of this writing, French troops plan a military intervention into Zaire to prevent Kisangani, the capital, from falling into rebel hands. The French want to secure the country's airport to allow aid deliveries to the refugees. Sam Kiley and Ben MacIntyre, *French Plan Intervention Force in Developing Struggle for Kisangani,* THE TIMES, March 13, 1997, in Overseas News section.

[171] The parties to the General Framework Agreement for Peace in Bosnia and Herzegovina, 35 I.L.M. 75 (1996) at Annex 11, agreed that the all civilians detained would to transferred as soon as possible to host nation police authorities.

[172] *See* Newton, *supra* note 72, at 30.

has extended its commitment to this operation until the summer of 1998,[173] involving the military in long-term civilian detentions should the politicians change their mind.

Not only has the rate of U.S. involvement in OOTW increased, but the range of civilians detained by the military in OOTW has expanded. In future OOTW, the military will need to detain civilians in OOTW not only to protect itself, but to protect the local population as well. In Operation Restore Hope, UNITAF permitted detention of those civilians who endangered military forces.[174] It also permitted detention of those civilians who were "suspected of crimes of such a serious nature . . . that the failure to detain would be an embarrassment to the U.S."[175] However, UNITAF strongly discouraged detaining civilians who threatened the local population in areas outside military control, stating that these civilians would be detained "only in exceptional circumstances."[176] However, in Operation Uphold Democracy, the MNF put no limits on detention of civilians whose crimes threatened the local population.[177] In Operation Restore Hope, the military could detain civilians who committed "willful killing, torture or inhumane treatment, rape, willfully causing great suffering or serious bodily injury to body or

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[173] Dusko Doder, *Bosnia's False Peace; Psychologically and Practically, All Sides are Preparing for War,* WASH. POST, Mar. 16, 1997, at C07.

[174] CUTF Policy, *supra* note 21, at ¶ 4A.

[175] *Id.*

[176] *Id.* at ¶ 4D(2).

[177] HAITI AAR, *supra* note 6, at 69

health."[178] In Operation Uphold Democracy, the MNF expanded this range of crimes to include arson and robbery.[179]

The military can either sit back and react to the next civilian detention requirement, or it can plan for this contingency in advance by developing uniform detention procedures.

B. The Risk of Liability

The risk of suit against the U.S. is the worst consequence of not developing uniform detainee procedures. Detainee suits against the U.S. for violations of international law pose a greater threat than prosecution by an international military tribunal.[180] Inconsistent military detainee treatment practices that fail to incorporate international law on detainees expose the U.S. to potential liability from violations of international law while detaining civilians in OOTW. Detainees may sue the U.S. for violations of international law through American federal courts under the federal question jurisdiction statute.[181] Detainees may also sue the U.S. for violating their constitutional rights; one

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[178] CUTF Policy, *supra* note 21, at ¶ 4A.

[179] INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 8-11 (1996) [hereinafter JA 422].

[180] *See* Newton, *supra* note 72, at 76 (Describing the time, money and administrative burdens of establishing an international military tribunal).

[181] 28 U.S.C. §§ 1331 (1993).

federal circuit currently holds that the Constitution indeed protects aliens, outside the territorial U.S., when confronted with official U.S. action.

1. International Law Avenues for Suit--

With few exceptions, the U.S. has scrupulously avoided exposing itself to scrutiny by judicial bodies that apply international law. For example, President Carter forwarded the American Convention with the Senate for its advice and consent to ratification in 1978.[182] At this time, he did not recommend that the U.S. declare submission to the jurisdiction of the Inter-American Court of Human Rights.[183] Another example is the U.S. refusal to ratify the Optional Protocol to the International Convention on Civil and Political Rights.[184] This Protocol would have allowed the Convention's Human Rights Committee to consider complaints from individuals who claim to be victims of U.S. violations of any of the rights set forth in the International Covenant.[185] The U.S. attached declarations to its ratifications of the International Covenant[186] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)[187] which refused to recognize the competence of the

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[182] Casebook, *supra* note 99, at 718.

[183] *Id.*

[184] U.N.G.A. Res. 2200 A [XXI], 21 UN GAOR Supp. (No. 16) at 39, U.N. Doc A/6316, 999 U.N.T.S. 302, *entered into force* March 23, 1976.

[185] *Id.*

[186] S4781-01, *supra* note 109, at ¶ I(3).

[187] Torture Convention, *supra* note 74, at art. 21.

monitoring committees created by these treaties to hear complaints by individuals against the U.S. for violations of these treaties.[188] In 1985, the U.S. terminated its acceptance of compulsory jurisdiction before the International Court of Justice[189] as a result of the proceedings initiated against it by Nicaragua.[190]

Furthermore, aliens cannot sue the U.S. under many of the statutes that give U.S. federal courts jurisdiction over claims based on violations of international law. The Alien Tort Claims Act (ATCA)[191] states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[192] One could infer from a plain reading of this statute that aliens, like detainees in OOTW, can sue the U.S. under the ATCA for violation of international law. However, no alien has successfully sued the U.S. under this statute. This is because federal courts have interpreted the ATCA to be a

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[188] S17486-01, *supra* note 75, at ¶ I(1).

[189] The International Court of Justice (I.C.J.) has heard cases from member states regarding the arbitrary detention and maltreatment of detainees by other member states. Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), 1993 I.C.J. 325; U.S. Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 3 (May 24, 1980) (U.S. sues Iran for detention of 52 U.S. nationals working at the American Embassy in Tehran); Nottebohm Case (Liechtenstein v. Guatemala) 1955 I.C.J. 4, 6 (April 6, 1955) (dismissed because Liechtenstein insufficiently established that the victim was one of its citizens).

[190] DEP'T ST. BULL., Jan. 1986, at 67 *reprinted in* Casebook, *supra* note 99, at 65.

[191] Originally included in the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (codified as amended at 28 U.S.C. § 1350 (1988)) [hereinafter ATCA].

[192] *Id.*

jurisdictional statute only, not a waiver of U.S. sovereign immunity.[193] The Torture Victims Protection Act (TVPA)[194] allows aliens and U.S. citizens to sue any individual who engages in torture or "extrajudicial killing" under "actual or apparent authority, or under color of law of any foreign nation."[195] This statute does not permit aliens to sue U.S. military officials who commit acts of torture under U.S. authority. Furthermore, the U.S. may have denied detainees a private right of action under the Torture Convention. This Convention requires that parties provide torture victims with a private right of action for damages resulting from the torture.[196] The U.S. attached an understanding to this treaty's ratification stating that torture victims have a private right of action only for "acts of torture committed in territory under the jurisdiction of that State Party."[197] While the argument exists that a detention facility operated by the military during an OOTW falls under U.S. jurisdiction,[198] this argument's success is far from certain.

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[193] Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207n.5 (1985) (The ATCA does not provide a waiver of sovereign immunity for the U.S. where members of Congress, citizens and residents of Nicaragua, and two Florida residents sue the President and other federal defendants alleging claims arising out of U.S. actions in Nicaragua.); Goldstar (Panama) S.A. v. U.S., 967 F.2d 965, 968 (4th Cir. 1992) (The ATCA does not provide a waiver of sovereign immunity for the U.S. where a group of Panamanian businesses claim that the U.S. is liable for damage to property sustained as a result of looting and rioting in the wake of Operation Just Cause.); Canadian Transport Co. v. U.S., 663 F.2d 1081, 1092 (D.C. Cir. 1980) (Treaty between U.S. and Canada did not waive sovereign immunity so as to allow tort suit against the U.S. under the ATCA).

[194] Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (Supp. V 1993)) [hereinafter TVPA].

[195] *Id.*

[196] Torture Convention, *supra* note 74, at art. 14.

[197] 136 CONG. REC. S17492 (daily ed. Oct. 27, 1990) [hereinafter S17492].

[198] *See* discussion *infra* Part *IBb.*

The U.S. has compensated detainees in OOTW for damages arising from their detention through the Foreign Claims Act and the International Claims Act.[199] However, the detainee has no judicial remedy for appeal of claims decisions under these statutes, as they are purely administrative in nature.[200] The Federal Tort Claims Act (FTCA),[201] the primary means of redress for damage caused by the wrongful acts or omissions of military personnel, provides a judicial remedy for appeal of claims decisions. However,

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[199] The Foreign Claims Act (FCA), 10 U.S.C. § 2734 (1996), and the International Claims Act, 10 U.S.C. § 2734*a* (1990), are other means to obtain redress for injury through the U.S. The FCA authorizes the administrative settlement of claims of inhabitants of a foreign country, or by a foreign country or a political subdivision thereof, against the United States for personal injury or death or property damage caused outside the United States, its territories, commonwealths, or possessions by military personnel or DOD civilian employees, or claims which arise incident to U.S. military noncombatant activities. DEP'T OF ARMY, REGULATION 27-20, CLAIMS ¶ 10-2 [hereinafter AR 27-20]. However, the FCA does not require the U.S. to establish a FCA program during U.S. military operations. *See* McFarland v. Chaney, Civ. #91-5173 (D.C. Cir. 1992) (Refusal to establish an FCA program during Operation Just Cause is not subject to judicial review). A national of a country "at war or engaged in armed conflict with the United States" cannot be a claimant under this statute unless the appropriate authority determines that the claimant is, and was, at time of the incident, friendly to the U.S. AR 27-20, *supra* this note, at ¶ 10-7. Judge advocates have not considered civilian detainees to fall under this category. They compensated some detainees who claimed that the military police lost their property during their detention under this statute during Operation Uphold Democracy. Interview with Major Fred Ford, member of the foreign claims commission for Operation Uphold Democracy (February 10, 1997). The International Agreement Claims Act provides that foreign governments may assume responsibility for settling claims against the U.S. pursuant to the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA), or other similar treaty or agreement. AR 27-20, *supra* this note, at ¶ 10-4.

[200] *Id.*

[201] 28 U.S.C. § 1346(b) (West 1965 & Supp. 1993) [hereinafter FTCA].

federal courts have interpreted this statute to deny claimants relief for damages arising in a foreign country.[202]

Detainees in OOTW still have one means of suing the U.S. for violations of international law on detainees.

b. The General Federal Question Jurisdiction Statute--

Detainees may sue for violations of international law through the general federal question jurisdiction statute (section 1331).[203] This statute reads that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States."[204]

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[202] Federal courts have refused to award compensation for claims arising under the FTCA at leased military bases in Newfoundland (Spelar v. U.S., 171 F.2d 208 (2d Cir. 1948)) and the Philippines (Pedersen v. U.S., 191 F.Supp. 95 (D. Guam 1961)); in the American Embassy in Japan (Bell v. U.S., 31 F.R.D. 32 (D. Kan. 1962)); in Okinawa under the de facto sovereignty of the U.S. (Cobb v. U.S., 191 F. 2d 604 (9th Cir. 1951) cert. denied, 342 U.S. 913 (1952)); on Kwajalein under the trusteeship of the U.S. (Callas v. U.S., 253 F.2d 838 (2d Cir. 1958)); Antarctica (Smith v. U.S., 113 S.Ct. 1178 (1993)); and in various occupied countries (Welch v. U.S., 446 F.Supp. 75 (D. Conn. 1978) (Italy)). *See* AR 27-20, *supra* note 199, ¶ 4-7*n*; US ARMY CLAIMS SERVICE, OFFICE OF THE JUDGE ADVOCATE GENERAL, FEDERAL TORT CLAIMS ACT HANDBOOK ¶ IIB4l(1) (February 1995) [hereinafter HANDBOOK]. Where the actionable negligence has occurred in the U.S. and only the consequences occurred in a foreign country, courts have applied the FTCA. In re Paris Air Crash of 3 March 1974, 399 F.Supp. 732 (C.D. Cal. 1975); *See* AR 27-20, *supra* note 199, at ¶ 4-7*n*; HANDBOOK, *supra* this note, ¶ IIB4l(3).

[203] 28 U.S.C. § 1331 (1993).

[204] *Id.*

The federal circuits are split on how to apply section 1331. A number of courts hold that jurisdiction arises under this statute only when a treaty creates a private right of action, either expressly or by clear implication.[205] A violation of international law, by itself, is insufficient.[206] These courts primarily cite the District of Columbia Circuit Court of Appeal's decision in Tel-Oren v. Libyan Arab Republic (Tel-Oren)[207] to support this interpretation. Other district courts interpret this statute more expansively. Relying on the proposition that federal common law incorporates international law,[208] these courts state that a violation of international law by itself is sufficient to provide jurisdiction under this statute.[209] Under this interpretation, international law "arises under" the laws of the U.S. for purposes of this statute.[210] These courts usually cite Forti

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[205] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779, 811 (D.C.Cir. 1984) *cert. den.* 470 U.S. 1003 (1985); Handel v. Artukovic, 601 F.Supp. 1421, 1426-7 (C.D. Cal.1985); Xuncax v. Gramajo, 886 F.Supp. 162, 194 (D.Mass 1995).

[206] *Id.*

[207] Tel-Oren, 726 F.2d 774.

[208] The Paquete Habana, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900); In re Estate of Ferdinand E. Marcos Human Rights Litigation (Marcos I), 978 F.2d 493, 502 (9th Cir. 1992), *cert. denied,* 508 U.S. 972, 113 S.Ct. 2960, 125 L.Ed.2d 661 (1993) (Philippine citizen sues daughter of former Philippine president asserting wrongful death claim in connection with son's death by torture).

[209] Forti v. Suarez-Mason, 672 F.Supp. 1531, 1544 (N.D. Cal 1987); Abebe-Jiri v. Negewo, No. 90-2010 (N.D. Ga. Aug. 20, 1993), *affd.* F.3d 844 (11th Cir. 1996).

[210] *Id.*

v. Suarez-Mason[211] for support. The Second Circuit has held discussed section 1331 jurisdiction but has declined to base any of its decisions on this statute.[212]

Under the Tel-Oren interpretation of section 1331, the court would probably lack jurisdiction over detainees' damage claims against the U.S. for torture, "cruel, inhuman or degrading punishment," and due process violations. Torture and "cruel, inhuman or degrading punishment" would be a close call, however. The Torture Convention requires that its parties provide a private right of action to torture victims.[213] The U.S. attached an understanding to this Convention that limits this right of action to "damages only for acts of torture committed in territory under the jurisdiction of that State Party."[214] Whether this phrase establishes a private right to action depends on the court's interpretation of whether a detention facility, operated by the military during an OOTW, falls under U.S. "jurisdiction."

The court would have a more difficult time finding a private right of action under the International Convention, based on the U.S. declaration that it is non self-executing.[215] Handel v. Artukovic holds that if a treaty is not self-executing, then it cannot provide a

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[211] Forti, 672 F.Supp. 1531, 1544.

[212] Filartiga v. Pena-Irala, 630 F.2d 876, 887n.22 (2d Cir. 1980); Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995).

[213] Torture Convention, *supra* note 74, at art. 14.

[214] S17492, *supra* note 197.

[215] *See* discussion *infra* Part *IBb.*

private right of action.[216] However, the court may find that this treaty is indeed self-executing, notwithstanding the declaration. It may find that its provision that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation," indeed creates a private right of action for detainees in OOTW.

Detainees suing the U.S. for arbitrary detention and maltreatment in a court that follows the Forti interpretation of section 1331 have a gold mine of arguments at their disposal. These detainees need to argue that their treatment by the military violated international law on detainees. Sources of international law include international treaties,[217] "general principles common to the major legal systems of the world" (state practice),[218] and customary law.[219],[220]

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[216] Handel v. Artukovic, 601 F.Supp. 1421, 1426-7 (C.D. Cal.1985).

[217] International agreements stand as a primary source of international law. Their influence can extend even beyond the parties to the agreement, to the extent that they codify existing rules of customary law. Naturally, the greater the number of states party to a treaty, the more the agreement will be universally accepted as declaratory of a rule of customary law. DEP'T OF ARMY, PAM 27-161-1, LAW OF PEACE, ¶ 1-6 (September 1979) (*rescinded* Sept. 1979) [hereinafter DA Pam 27-161-1].

[218] General principles of law refer to the use of legal principles, common to all nations, in deciding questions of international law. In several post World War II war crimes trials, the tribunals looked to the "municipal law of states in the family of nations" to find general principles of international law. U.S. v. List, in XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS, 1230-1317 (1950), *quoted in* DA Pam 27-161-1, *supra* note 217, at ¶ 1-6*d*(3).

[219] A customary norm of law "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT, *supra* note 72, at § 101(2) (1986). One source of customary law that has received a lot of attention since World War II are pronouncements of the UN General Assembly and its subsidiaries. Although not binding legal instruments, the influence of these pronouncements have been very significant, affecting the substantive law of various countries, and leading to the incorporation of human rights provisions in the constitutions or criminal codes of

Prohibition of torture and "cruel, inhumane or degrading treatment" is a well-supported tenet of customary international law.[221] No country formally considers torture as legal.[222] It is a norm of *jus cogens*, one of the "peremptory rules of international law that are of superior status and cannot be affected by treaty."[223]

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other countries. *See* RHYNE, *supra* note 20, at 396 (describing the influence of one U.N. pronouncement, the Universal Declaration on Human Rights, on global human rights); *See* Whitaker, *supra* note 20, at 19 (describing how the JTF attorneys in Operation Uphold Democracy relied upon one UN declaration, the Universal Declaration, as "binding law" to regulate U.S. military conduct in operating the Joint Detention Facility). However, some of these instruments reflect aspirations rather than true customary law. Because of this, it is often difficult to determine exactly when a custom can be said to have truly become authoritative law. DA Pam 27-161-1, *supra* note 217, at ¶ 1-6*c*.

[220] RESTATEMENT, *supra* note 72, at § 102.

[221] Universal Declaration of Human Rights, G.A. Res. 217A (III), Dec. 10, 1948, U.N. Doc. A/810 at art. 5 (1948) [hereinafter the Universal Declaration]; International Covenant, *supra* note 20, at art. 7; American Convention, *supra* note 82, at art. 27; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, at art. 15, *entered into force* Sept. 3, 1953, *as amended by* Protocols No. 3, 5 & 8, *entered into force* Sept. 21, 1970, Dec. 21, 1971 and Jan. 1, 1990 [hereinafter European Convention]; African [Banjul] Charter on Human and People's Rights, O.A.U. Doc. CAB/LEG/67/3 rev. 5, art. 5, June 27, 1981, *reprinted in* 21 I.L.M. 58 (1982) [hereinafter African Charter]; Torture Convention, *supra* note 74, at arts. 1-33; Genocide Convention, *supra* note 76, at art. II; Body of Principles, *supra* note 135, at princ. 5; Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) ("deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, . . . "); Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995); Forti v. Suarez-Mason, 672 F.Supp. 1531, 1544 (N.D. Cal 1987); Abebe-Jiri v. Negewo, No. 90-2010 (N.D. Ga. Aug. 20, 1993), *affd.* F.3d 844 (11th Cir. 1996); Xuncax v. Gramajo, 886 F.Supp. 162, 194 (D.Mass 1995).

[222] NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 70 (1987) [hereinafter Rodley].

[223] RESTATEMENT, *supra* note 72, at § 331, comment e.

Torture is fairly easy to identity, but "cruel, inhumane or degrading treatment" is not. The treaties that prohibit this kind of treatment decline to define it with any specificity. Case law from other judicial forums for violations of international law have refined this definition. One court rejected a claim for compensation under the ATCA based on "cruel, inhumane or degrading treatment" because this norm was "clearly lacking in that level of common understanding necessary to create universal consensus."[224] Recent ATCA litigation has established that forcing one to witness soldiers physically abuse relatives, destroying personal property, and rape constitute "cruel, inhumane or degrading treatment."[225] The European Court of Human Rights found interrogation techniques of "hooding," sleep deprivation, wall-standing and food deprivation to constitute "cruel, inhuman or degrading treatment."[226] The Human Rights Committee has found that forcing a detainee to stand for 35 hours, with eyes bandaged and wrists bound, within earshot of other detainees being tortured, and then threatening the detainee with torture during a subsequent interrogation, constituted "cruel, inhuman or degrading treatment."[227]

Customary international law, international treaties and state practice also support a detainee's right to be free from arbitrarily detention. A detention is arbitrary if it is

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[224] Forti v. Suarez-Mason, 694 F.Supp. 707, 709, 712 (N.D.Cal. 1988).

[225] Xuncax v. Gramajo, 886 F.Supp. 162 (D.Mass 1995).

[226] Republic of Ireland v. UK, 2 Eur. Ct. H.R. (ser. A) at ¶¶ 96 and 168 (1978).

[227] Bouton v. Uruguay, Report of the Human Rights Committee, GAOR, 35th Session, Supp. No. 40 (1980), Annex XIV, ¶ 13.

"incompatible with the principles of justice or with the dignity of the human person."[228] Freedom from arbitrary detention is a well-established tenet of customary international law. Almost every human rights oriented treaty (to include three regional treaties[229] and the International Covenant of Civil and Political Rights)[230] and UN declaration[231] since

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[228] RESTATEMENT, *supra* note 72, at § 702, Comment (1987) *quoting* Statement of U.S. Delegation, 13 GAOR, U.N. Doc. A/C.3/SR.863 at 137 (1958).

[229] European Convention, *supra* note 221, at art. 5:

> 1. . . [n]o one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . . (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offense or when it is reasonably necessary to prevent his committing an offense or fleeing after having done so; . . .

African Charter, *supra* note 221, at art. 6 ("Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."); American Convention, *supra* note 82, at art. 7:

> 1. Every person has the right to personal liberty.
> 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
> 3. No one shall be subject to arbitrary arrest or imprisonment.

Convention on the Safety of United Nations and Associated Personnel, *opened for signature* Dec. 2, 1994, G.A. Res. 49/59, U.N. GAOR, 49th Sess., Agenda Item 141, U.N. Doc. A/49/742 at art. 17 (1994), *reprinted in* 34 I.L.M. 482 (1995) [hereinafter Safety Convention] ("[a]ny person regarding whom investigations or proceedings are being carried out in connection with any of the crimes set out in article 9 shall be guaranteed fair treatment, a fair trial and full protection of his or her rights at all stages of the investigations or proceedings.").

[230] The International Covenant, *supra* note 20, art. 9 ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.").

the end of World War II prohibits arbitrary detention. At least forty-one nations guarantee criminal suspects in police custody freedom from arbitrary detention in their constitutions[232] and/or criminal codes.[233] In litigation under the Alien Tort Claims Act,

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[231] Universal Declaration, *supra* note 221, at art. 9 ("No one shall be subjected to arbitrary arrest, detention or exile."); Body of Principles, *supra* note 135, at princ. 2 ("Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose."); 8th U.N. Congress on the Prevention of Crime and the Treatment of Offenders Report, U.N. Doc. A/CONF.144/28 (1990) ("Emphasizing that no one shall be subjected to arbitrary arrest or detention, . . .") [hereinafter 8th UN Congress].

[232] Nations that have prohibited arbitrary detention in their constitutions include Algeria, DEP'T OF ARMY, PAM 550-44, AREA HANDBOOK SERIES, ALGERIA, 200 (1993) [hereinafter DA PAM 550-44]; Belarus (Adopted March 15, 1994. <www.law.cornell.edu/law/au_indx.html>); Cameroon, DEP'T OF ARMY, PAM 550-166, AREA HANDBOOK SERIES, CAMEROON 135 (1974) [hereinafter DA PAM 550-166]; Comoros, DEP'T OF ARMY, PAM 550-154, AREA HANDBOOK SERIES, INDIAN OCEAN 189 (1995) [hereinafter DA PAM 550-154]; Cote d'Ivoire, DEP'T OF ARMY, PAM 550-69, AREA HANDBOOK SERIES, COTE D'IVOIRE, 145, 200 (1991) [hereinafter DA PAM 550-69]; Brazil (Adopted 1967, ¶ 12 of art. 153), DEP'T OF ARMY, PAM 550-20, AREA HANDBOOK SERIES, BRAZIL 325 (1983) [hereinafter DA PAM 550-20]; Germany, DEP'T OF ARMY, PAM 550-173, AREA HANDBOOK SERIES, GERMANY 511-2, 347-8 (1996) [hereinafter DA PAM 550-173]; India, DEP'T OF ARMY, PAM 550-21, AREA HANDBOOK SERIES, INDIA 617 (1996) [hereinafter DA PAM 550-21]; Liberia (Adopted 1986), DEP'T OF ARMY, PAM 550-38, AREA HANDBOOK SERIES, LIBERIA 213-4 (1985) [hereinafter DA PAM 550-38]; Malaysia, DEP'T OF ARMY, PAM 550-45, AREA HANDBOOK SERIES, MALAYSIA 189 (1985)); Mauritania, DEP'T OF ARMY, PAM 550-161, AREA HANDBOOK SERIES, MAURITANIA 126, 131 (1990) [hereinafter DA PAM 550-161]; Nepal and Bhutan, DEP'T OF ARMY, PAM 550-35, AREA HANDBOOK SERIES, NEPAL AND BHUTAN 153-4 (1993) [hereinafter DA PAM 550-35]; Nigeria, DEP'T OF ARMY, PAM 550-157, AREA HANDBOOK SERIES, NIGERIA 308 (1992) [hereinafter DA PAM 550-157]; Pakistan, DEP'T OF ARMY, PAM 550-48, AREA HANDBOOK SERIES, PAKISTAN 309 (1995) [hereinafter DA PAM 550-48]; Somalia, DEP'T OF ARMY, PAM 550-86, AREA HANDBOOK SERIES, SOMALIA 221 (1993) [hereinafter DA PAM 550-86]; South Korea, DEP'T OF ARMY, PAM 550-41, AREA HANDBOOK SERIES, SOUTH KOREA 202 (1992) [hereinafter DA PAM 550-41]; Sudan, DEP'T OF ARMY, PAM 550-27, AREA HANDBOOK SERIES, SUDAN 211 (1992) [hereinafter DA PAM 550-27]; Zaire (Adopted 1974), DEP'T OF ARMY, PAM 550-35, AREA HANDBOOK SERIES, ZAIRE 323 (1994) [hereinafter DA PAM 550-35]; El Salvador, EL SAL. CONST. art. 13; France, FR. CONST. art. 66; Mexico, MEX. CONST. art. 19; Panama, PAN. CONST. art. 21; Peru, PERU CONST. art. 231; Portugal, PORT. CONST. art. 32; Spain, SPAIN CONST. art. 17; Sri Lanka, SRI LANKA CONST. art. 13; and the United

U.S. courts have repeatedly held that arbitrary detention violates the "law of nations."[234] Decisions from the European Court of Human Rights have condemned arbitrary detention as well.[235] There is even more support among sources of international law for condemning *prolonged* arbitrary detention.[236]

States, U.S. CONST. amend. 5 ("No person shall . . . be deprived of life, liberty or property, without due process of law[;]").

[233] Nations that have prohibited arbitrary detentions in their criminal codes include Armenia, DEP'T OF ARMY, PAM 550-111, AREA HANDBOOK SERIES, ARMENIA 60 (1995) [hereinafter DA PAM 550-111]; Austria, DEP'T OF ARMY, PAM 550-176, AREA HANDBOOK SERIES, AUSTRIA 253 (1994) [hereinafter DA PAM 550-176]; Azerbaijan, DA PAM 550-111, *supra* this note, at 301; Belize, DEP'T OF ARMY, PAM 550-82, AREA HANDBOOK SERIES, BELIZE 307 (1993) [hereinafter DA PAM 550-82]; Cambodia, Law of March 12, 1986, DEP'T OF ARMY, PAM 550-50, AREA HANDBOOK SERIES, CAMBODIA 301 (1990) [hereinafter DA PAM 550-50]; Chad, DEP'T OF ARMY, PAM 550-159, AREA HANDBOOK SERIES, CHAD 203 (1990) [hereinafter DA PAM 550-159]; Finland, DEP'T OF ARMY, PAM 550-167, AREA HANDBOOK SERIES, FINLAND 341 (1990) [hereinafter DA PAM 550-167]; Greece, DEP'T OF ARMY, PAM 550-87, AREA HANDBOOK SERIES, GREECE 320 (1995) [hereinafter DA PAM 550-87]; India, Code of Criminal Procedure of 1973, DA PAM 550-21, *supra* note 232, at 617; Egypt, DEP'T OF ARMY, PAM 550-43, AREA HANDBOOK SERIES, EGYPT 343 (1991) [hereinafter DA PAM 550-43]; Equador, DEP'T OF ARMY, PAM 550-52, AREA HANDBOOK SERIES, EQUADOR 245 (1991) [hereinafter DA PAM 550-43]; Finland, DEP'T OF ARMY, PAM 550-167, AREA HANDBOOK SERIES, FINLAND 341 (1990) [hereinafter DA PAM 550-167]; Lithuania, DEP'T OF ARMY, PAM 550-113, AREA HANDBOOK SERIES, ESTONIA, LATVIA AND LITHUANIA 240 (1996) [hereinafter DA PAM 550-113]; Nicaragua, DEP'T OF ARMY, PAM 550-88, AREA HANDBOOK SERIES, NICARAGUA 223 (1994) [hereinafter DA PAM 550-88]; Turkey, DEP'T OF ARMY, PAM 550-80, AREA HANDBOOK SERIES, TURKEY 367-8 (1996) [hereinafter DA PAM 550-80]; Western Samoa, Thuy Dinh, *The Legal System of Western Samoa*, *in* 2A MODERN LEGAL SYSTEMS CYCLOPEDIA, at 2A.100.12, § 1.2(A) (Kenneth R. Redden, ed., 1988) [hereinafter CYCLOPEDIA]

[234] *See* Forti v. Suarez-Mason, 672 F.Supp. 1531,1541-1542 (N.D.Cal. 1987); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984); Xuncax v. Gramajo, 886 F.Supp. 162, 184 (D.Mass. 1995).

[235] Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. A) at 15 (1979) (5 month detention without review by a judge and without trial not a violation of the European Convention's prohibition on arbitrary detention where a state of emergency existed and where detainee could have his detention reviewed by a commission upon request); Brannigan and McBride v. United Kingdom, 17 Eur. Ct. H.R. 539 (ser. A) at 539 (1994) (Detention of

Examining sources of international law lends some insight into exactly what due process procedures make a detention no longer arbitrary. These sources strongly support a detainee's right to three due process procedures. These procedures are 1) a right to be promptly informed of the grounds for arrest,[237] 2) a right to a prompt appearance before

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six days without review by a magistrate not a violation of the European Convention's prohibition on arbitrary detention where state of emergency existed and detainee could have petitioned for habeus corpus); Brogan and Others v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) at 117 (1989) (Four days and six hours before appearance before magistrate excessive where detaining power had not made a formal declaration of its intention to deviate from due process standards under a state of emergency).

[236] *Id.* at § 702 ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones. . . (e) prolonged arbitrary detention. . . "); *id.* at Comment, ¶ *j* ("A single, brief arbitrary detention by an official of a state party to one of the principal international agreements might violate that agreement; arbitrary detention violates customary law if it is prolonged and practiced as a state policy."); Forti v. Suarez-Mason, 672 F.Supp. 1531, 1541 (N.D.Cal. 1987) ("There is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention. . . .The consensus is even clearer in the case of a state's *prolonged* arbitrary detention of its own citizens.").

[237] RESTATEMENT, *supra* note 72, at § 702, Comment, ¶ *h* ("Detention is arbitrary if it . . . is not accompanied by notice of charges[;]"). Many international treaties explicitly accord detainees the right to be promptly informed of the reasons for detention. International Covenant, *supra* note 20, at art. 2 ("Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."); American Convention, *supra* note 82, at art. 4 ("Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him."); European Convention, *supra* note 221, at art. 2 ("Everyone who is arrested shall be informed promptly, . . .of the reasons for his arrest and of any charge against him."); Protocol II, *supra* note 32, at art. 6(2.)*(a)* (All civilians accused of crimes during an internal conflict shall "be informed without delay of the particulars of the offense alleged against him . . ."). Several U.N. instruments explicitly accord detainees the right to be promptly informed of the reasons for detention. Draft Code of Crimes Against the Peace and Security of Mankind, Sept. 11, 1991, 30 I.L.M. 1584, at art. 8 [hereinafter Draft Code]:

> An individual charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all

human beings with regard to the law and the facts. In particular, he shall have . . .the rights: . . .(b) to be informed promptly and in detail . . . of the nature and cause of the charge against him . . .

Body of Principles, *supra* note 135, at princ. 10 ("Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him."); 8th U.N. Congress, *supra* note 231, at the Preamble ("Recognizing that everyone charged with a criminal offence shall have the right . . . to be informed promptly of the charges against them . . ."). The constitutions and/or criminal codes of at least 23 nations require their police to promptly inform suspects of crime in police custody of the charges against them. These nations include Algeria, DA PAM 550-44, *supra* note 232, at 200, 281; Belize, DA PAM 550-82, *supra* note 233, at 307; Brazil (Local police have 24 hours within which to inform the accused of the grounds of his/her detention), DA PAM 550-20, *supra* note 232, at 325; Chad, DA PAM 550-34, *supra* note 233, at 203; Indonesia, DEP'T OF ARMY, PAM 550-39, AREA HANDBOOK SERIES, INDONESIA, 340-1 (1993) [hereinafter DA PAM 550-39]; Iran, DEP'T OF ARMY, PAM 550-68, AREA HANDBOOK SERIES, IRAN, 296 (1989) [hereinafter DA PAM 550-68]; Jordan, DEP'T OF ARMY, PAM 550-34, AREA HANDBOOK SERIES, JORDAN, 274-6 (1991) [hereinafter DA PAM 550-34]; Liberia (in its 1986 constitution), DA PAM 550-38, *supra* note 232, at 213-4; Malaysia, DA PAM 550-45, *supra* note 232, at 189; Nepal and Bhutan (in its constitution), DA PAM 550-35, *supra* note 232, at 153-4; Pakistan, DA PAM 550-48, *supra* note 232, at 309-313; Paraguay, DEP'T OF ARMY, PAM 550-151, AREA HANDBOOK SERIES, PARAGUAY 241-2 (1990) [hereinafter DA PAM 550-151]; Peru, DEP'T OF ARMY, PAM 550-42, AREA HANDBOOK SERIES, PERU 213-4 (1993) [hereinafter DA PAM 550-42]; Philippines, DEP'T OF ARMY, PAM 550-72, AREA HANDBOOK SERIES, PHILIPPINES 298-9 (1993) [hereinafter DA PAM 550-72]; Somalia, DA PAM 550-86, *supra* note 232, at 219-21; South Korea, DA PAM 550-41, *supra* note 232, at 324-7; Spain, DEP'T OF ARMY, PAM 550-179, AREA HANDBOOK SERIES, SPAIN 331-2 (1990) [hereinafter DA PAM 550-179]; Sudan, DA PAM 550-27, *supra* note 232, at 211, 217; Turkey, DA PAM 550-80, *supra* note 233, at 367-8; Yugoslavia, DEP'T OF ARMY, PAM 550-99, AREA HANDBOOK SERIES, YUGOSLAVIA 278 (1992) [hereinafter DA PAM 550-99]; Zambia, DEP'T OF ARMY, PAM 550-75, AREA HANDBOOK SERIES, ZAMBIA 129 (1979) [hereinafter DA PAM 550-75]; and El Salvador, EL SAL. CONST. art. 11. ATCA plaintiffs whose grievances include arbitrary detention were not informed of the reasons for their arrest and detention by their captors. Forti v. Suarez-Mason, 672 F.Supp. 1531, 1537; Xuncax v. Gramajo, 886 F.Supp. 162,169-170, 174.

Detainees' rights to be informed of these charges in a language which they understand is specified in only one treaty and two U.N. instruments. European Convention, *supra* note 221, at art. 2; Body of Principles, *supra* note 135, at princ. 13; Draft Code, *supra* note 237, at art. 8(b). This probably does not indicate a rejection of this right. Rather, this is probably the result of the homogenous composition of many societies, or the result of an assumption that, in order to "inform," the recipient of the information must "understand."

a judicial or other authority to review the legality of the detention,[238] and 3) a right to a fair trial promptly after arrest[239] (the military lacks jurisdiction to prosecute detainees in OOTW).[240]

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[238] Several international treaties explicitly accord detainees the right to a prompt appearance before a judge or other competent authority. International Covenant, *supra* note 20, at art. 3 ("Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power . . ."); American Convention, *supra* note 82, at art. 5 ("Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power . . ."); European Convention, *supra* note 221, at arts. 3 and 4 ("Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power . . ."). The U.N. instruments that explicitly accord detainees this right include the Body of Principles and the 8th UN Congress. Body of Principles, *supra* note 135, at princs. 11 ("A person shall not be kept in detention without being given an opportunity to be heard promptly by a judicial or other authority.") and 37 ("A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person shall be kept under detention pending investigation or trial except upon the written order of such an authority."); 8th U.N. Congress, *supra* note 231, at ¶ 2(a) ("Persons suspected of having committed offences and deprived of their liberty should be brought promptly before a judge or other officer authorized by law to exercise judicial functions who should hear them and take a decision concerning pre-trial detention without delay[;]"). At least forty-six nations require that criminal suspects in police custody be brought before a judge or magistrate to decide upon continued detention. These nations include Algeria, DA PAM 550-44, *supra* note 232, at 200, 281; Angola, DEP'T OF ARMY, PAM 550-59, AREA HANDBOOK SERIES, ANGOLA, 251 (1991) [hereinafter DA PAM 550-59]; Austria, DA PAM 550-176, *supra* note 233, at 253; Bangladesh, DEP'T OF ARMY, PAM 550-175, AREA HANDBOOK SERIES, BANGLADESH, 153, 243 (1989) [hereinafter DA PAM 550-175]; Belize, DA PAM 550-82, *supra* note 233, at 307; Burma, DEP'T OF ARMY, PAM 550-61, AREA HANDBOOK SERIES, BURMA, 261-2 (1983) [hereinafter DA PAM 550-61]; Bolivia, DEP'T OF ARMY, PAM 550-66, AREA HANDBOOK SERIES, BOLIVIA, 268 (1991) [hereinafter DA PAM 550-66]; Cote d'Ivoire, DA PAM 550-69, *supra* note 232, at 145, 210; Cypress, DEP'T OF ARMY, PAM 550-22, AREA HANDBOOK SERIES, CYPRESS, 240-2 (1993) [hereinafter DA PAM 550-22]; Dominican Republic, DEP'T OF ARMY, PAM 550-36, AREA HANDBOOK SERIES, DOMINICAN REPUBLIC, 189 (1991) [hereinafter DA PAM 550-36]; El Salvador, DEP'T OF ARMY, PAM 550-150, AREA HANDBOOK SERIES, EL SALVADOR, 151, 155, 251 (1990) [hereinafter DA PAM 550-150]; Egypt, DA PAM 550-43, *supra* note 233, at 343; Equador, DA PAM 550-52, *supra* note 233, at 245; Finland, DA PAM 550-167, *supra* note 233, at 341; Germany, DA PAM 550-173, *supra* note 232, at 347-8, 511-2; Greece, DA PAM 550-

87, *supra* note 233, at 320; Haiti, HAITI CONST., arts. 24 and 26 (1987); India, DA PAM 550-21, *supra* note 232, at 617; Indonesia, DEP'T OF ARMY, PAM 550-39, AREA HANDBOOK SERIES, INDONESIA, 340-1 (1993) [hereinafter DA PAM 550-39]; Jamaica, DEP'T OF ARMY, PAM 550-33, AREA HANDBOOK SERIES, JAMAICA, 158 (1989) [hereinafter DA PAM 550-33]; Japan, DEP'T OF ARMY, PAM 550-30, AREA HANDBOOK SERIES, JAPAN, 456, 471-2 (1992) [hereinafter DA PAM 550-30]; Jordan, DA PAM 550-34, *supra* note 237, at 274-6; Liberia, DA PAM 550-38, *supra* note 232, at 213-4; Lithuania, DA PAM 550-113, *supra* note 233, at 240; Madagascar, DEP'T OF ARMY, PAM 550-154, AREA HANDBOOK SERIES, MADAGASCAR, 307 (1995) [hereinafter DA PAM 550-154]; Malaysia, DA PAM 550-45, *supra* note 232, at 189; Mexico, James E. Herget and Jorge Camil, *The Legal System of Mexico,* CYCLOPEDIA, *supra* note 233, at 1.30.23, § 1.2(H); Nepal and Bhutan, DA PAM 550-35, *supra* note 232, at 153-4; Nicaragua, DA PAM 550-88, *supra* note 233, at 221-3; Oman, DEP'T OF ARMY, PAM 550-185, AREA HANDBOOK SERIES, PERSIAN GULF STATES, 374 (1994) [hereinafter DA PAM 550-185]; Panama, DEP'T OF ARMY, PAM 550-46, AREA HANDBOOK SERIES, PANAMA, 251-2 (1989) [hereinafter DA PAM 550-46]; Paraguay, DA PAM 550-151, *supra* note 237, at 241-2; Peru, DA PAM 550-42, *supra* note 232, at 212, 314; Portugal, DEP'T OF ARMY, PAM 550-181, AREA HANDBOOK SERIES, PORTUGAL, 268-70 (1994) [hereinafter DA PAM 550-70]; Seyshelles, DA PAM 550-46, *supra* this note, at 244, 321; Somalia, DA PAM 550-86, *supra* note 232, at 219-220; South Korea, DA PAM 550-41, *supra* note 232, at 324-327; Spain, DA PAM 550-179, *supra* note 237, at 331-2; Sri Lanka, DEP'T OF ARMY, PAM 550-96, AREA HANDBOOK SERIES, SRI LANKA, 257-261 (1990) [hereinafter DA PAM 550-96]; Sudan, DA PAM 550-27, *supra* note 232, at 211-217; Taiwan, CYCLOPEDIA, *supra* note 233, at 2A.40.41, § 1.8(A); Turkey, DA PAM 550-80, *supra* note 233, at 367-8; Tunisia, DEP'T OF ARMY, PAM 550-89, AREA HANDBOOK SERIES, TUNISIA, 210, 222 (1987) [hereinafter DA PAM 550-89]; United Arab Emirates, DA PAM 550-185, *supra* this note, at 367; Uruguay, DEP'T OF ARMY, PAM 550-97, AREA HANDBOOK SERIES, URUGUAY, 230 (1992) [hereinafter DA PAM 550-97]; Western Samoa, CYCLOPEDIA, *supra* note 233, 2A.100.12, § 1.2(A); Yugoslavia, DA PAM 550-67, *supra* note 237, at 278; Zaire, DA PAM 550-67, *supra* note 232, at 323.

[239] International Covenant, *supra* note 20, at art. 14; American Convention, *supra* note 82, at art. 8; European Convention, *supra* note 221, at art.6; African Charter, *supra* note 221, at art. 7; Body of Principles, *supra* note 135, at princ. 38; 8th U.N. Congress, *supra* note 231, at the preamble; Draft Code, *supra* note 237, at art. 8(d).

[240] *See* Newton, *supra* note 72, at 15-23. American military commanders have authority to convene general courts martial or military commissions to punish civilians who violate the "laws of war" during an armed conflict. 10 U.S.C. §§ 818, 821 (1995). art. 21 of the Uniform Code of Military Justice (UCMJ) states that a commander may convene a military commission "with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." 10 U.S.C. § 821. Case law demonstrates that military commissions have jurisdiction only over violations of the international laws of war which occur in connection with international armed conflicts or occupation. *Ex parte Milligan,* 71 U.S. (4 Wall.) 2

(1866); Madsen v. Kinsella, 343 U.S. 341 (1952). Article 18 of the UCMJ establishes general court-martial jurisdiction over "any person who by the laws of war is subject to trial by a military tribunal." 10 U.S.C. § 818. The Rules for Court Martial, which implement the UCMJ, state that "[i]n cases tried under the law of war, a general court-martial may adjudge any punishment not prohibited by the law of war." MANUAL FOR COURTS MARTIAL, UNITED STATES (1995 ed.) [hereinafter MCM] at R.C.M. 1003(b)(12). These Rules also specify that courts-martial convened under Article 18 have jurisdiction over violations of the law of war as well as over offenses in violation of civil statutes when an occupying force declares martial law. *Id.* at R.C.M. 201. Two punitive UCMJ articles extend to prosecution of civilians "in time of war." 10 U.S.C. §§ 904 and 906. The Rules for Court Martial define "time of war" as a period declared by Congress or supported by the factual determination by the President that the existence of hostilities warrants a finding that a time of war exists for purposes of the Manual for Courts Martial, which contains the UCMJ and RCM. MCM, *supra* this note, at R.C.M. 103(19). OOTW do not rise to the level of international armed conflict necessary to trigger jurisdiction for commanders to use these means to prosecute civilians violators of the "law of war," or to be classified as a "time of war." *See* discussion *infra* Part I*B1*.

However, the idea of prosecuting civilians for grievous crimes committed during internal armed conflicts is gaining support from the international law community. The UN has established international tribunals for crimes committed by civilians during the internal ethnic conflict in Rwanda in 1994 and the former Yugoslavia in 1993. Rwanda Statute, *supra* note 58; Statute of the International Tribunal, *supra* note 72. Subject matter jurisdiction for these tribunals encompass genocide, as a violation of customary international law; crimes against humanity, drawing largely from the Charter for the Nuremberg tribunals; and violations of Common Article 3 to the Geneva Conventions and Article 4 of Protocol II to the Geneva Conventions, both of which apply to internal conflicts. *Id.* at art. 5; Rwanda Statute, *supra* note 58, at art. 3. However, creating international tribunals to prosecute international crimes takes time. Newton, *supra* note 72, at 76.

In response to this legal vacuum, several commentators have suggested that the U.S. establish jurisdiction over civilians during OOTW as well. *Id.*; Robinson O. Everett and Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994).

In theory, prosecuting detainees in OOTW should not be a problem. Most OOTW are premised upon a speedy restoration of the host nation's police and judicial functions. Robert Oakley and Michael Dziedzic, *Policing the New World Disorder*, INSTITUTE FOR NATIONAL STRATEGIC STUDIES STRATEGIC FORUM (October 1996). Once these functions return, the U.S. can transfer the detainees back to the host nation. Detainee facilities are supposed to be temporary measures to bring lawlessness under control so that the task of training or retraining the police and judiciary can begin. *Id.* Eventually, the law enforcement function is to shift back to host nation police, often aided by U.N. civilian police or International Police Monitors. *Id.* Therefore, in principle the detention facility should be operational for only a couple of months. In Operation Uphold Democracy, the Multinational Force (MNF) ran the detention facility for only four months before

Many of these sources of customary international law and state practice support other detainee due process procedures as well, although somewhat less so than the previous three procedures. These procedures include 1) freedom from ex post facto[241] laws,[242] 2) a right to have one's rights as a detainee explained upon arrest or promptly thereafter,[243]

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transferring it back to the Haitian Ministry of Justice. HAITI AAR, *supra* note 6, at 67; Memorandum, MNF-SJA to MNF Historian, subject: Unit Historian After Action Review, ¶ 3 (30 March 1995). With civilians detained for this short period of time, initiating prosecutions would hardly have been worthwhile. However, in Operation Restore Hope, the detention facility operated for a total of about 13 months, five of which were under U.S. control and the other eight under UN control. Lorenz, *supra* note 6, at 34-35; Dowden II, *supra* note 12, at 11. The U.S. had begun transferring many detainees to Somali prisons within the first five months of the operation. Somalia Legal AAR, *supra* note 61, at ¶ F2. The UN continued to use the facility to detain close advisors of Somali warlord Mohammed Aidid and those suspected in the death of American soldiers. Dowden II, *supra* note 12, at 11. The UN Security Council had ordered Aidid's "arrest and detention for prosecution, trial and punishment" for "crimes against humanity." SC Res. 837, UN SCOR, 48th Sess., 3229th mtg. at 83, UN Doc. S/INF/49 (1993). However, the UN rescinded this order when Aidid stepped up attacks on UN troops. SC Res. 885, UN SCOR, 48th Sess., 3315th mtg., at 86, UN Doc. S/INF/49 (1993) The lesson learned from Somalia is that prosecuting civilians detained during OOTW is still an issue, albeit an issue which exceeds the scope of this paper.

[241] "After the fact;" BLACK'S, *supra* note 31, at 580.

[242] International Covenant, *supra* note 20, at art. 15; American Convention, *supra* note 82, at art. 9; European Convention, *supra* note 221, at art. 7; African Charter, *supra* note 221, at art. 7. Nations that prohibit prosecution under *ex post facto* laws include Belgium, DEP'T OF ARMY, PAM 550-170, AREA HANDBOOK SERIES, BELGIUM, 290 (1985) [hereinafter DA PAM 550-170]; Cameroon, DA PAM 550-166, *supra* note 232, at 135; Czechoslovakia, DEP'T OF ARMY, PAM 550-158, AREA HANDBOOK SERIES, CZECHOSLOVAKIA, 258-9 (1989) [hereinafter DA PAM 550-158]; Greece, DA PAM 550-87, *supra* note 233, at 245, 320; Mexico, CYCLOPEDIA, *supra* note 233, at 1.30.58, § 1.7(C); Paraguay, DA PAM 550-151, *supra* note 232, at 241-2; Spain, CYCLOPEDIA, *supra* note 233, at 4.160.13, § 1.2(c); Sweden, CYCLOPEDIA, *supra* note 233, at 4.200.23, § 1.4(B)(1); and Zambia, DA PAM 550-75, *supra* note 237, at 121.

[243] 8th U.N. Congress, *supra* note 231, at ¶ 2(g); Body of Principles, *supra* note 135, at princ. 13. No treaties require that detainees be explained their rights promptly after arrest.

3) a right to speak at the hearing on the legality of the detention,[244] 4) access to counsel while in detention,[245] 5) access to a representative from the detainee's state, or from a

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[244] The U.N. instruments that explicitly accord detainees this right include the Body of Principles and the 8th UN Congress. Body of Principles, *supra* note 135, at princs. 11 ("A person shall not be kept in detention without being given an opportunity to be heard promptly by a judicial or other authority.") and 37:

> A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person shall be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

8th U.N. Congress, *supra* note 231, at ¶ 2(a) ("Persons suspected of having committed offences and deprived of their liberty should be brought promptly before a judge or other officer authorized by law to exercise judicial functions who should hear them and take a decision concerning pre-trial detention without delay[;]").

[245] RESTATEMENT, *supra* note 72, at § 702 Comment, ¶ *h* ("Detention is arbitrary if . . .the person detained is not given early opportunity to . . . consult counsel[;]"); 8th U.N. Congress, *supra* note 231, at ¶ 2(g)(i), (ii); Body of Principles, *supra* note 135, at princs. 11, 17 and 18. At least 16 nations provide criminal suspects in police custody access to an attorney. These include Algeria (access to an attorney, but no attorney provided), DA PAM 550-44, *supra* note 232, at 200, 281; Belize (access) DA PAM 550-82, *supra* note 233, at 200, 281; Cambodia (access to an attorney and attorney provided free of charge if indigent), DA PAM 550-50, *supra* note 233, at 301; Chad, DA PAM 550-159, *supra* note 233, at 203; Cyprus (access to an attorney only), DA PAM 550-22, *supra* note 238, at 240-2; Czechoslovakia, DA PAM 550-158, *supra* note 242, at 258-9; Egypt (access to attorney, and attorney provided free of charge if indigent), DA PAM 550-43, *supra* note 233, at 343; Haiti (access to attorney only), DEP'T OF ARMY, PAM 550-36, AREA HANDBOOK SERIES, DOMINICAN REPUBLIC AND HAITI, 373 (1991) [hereinafter DA PAM 550-36]; Indonesia (access to attorney and attorney provided free of charge to indigents), DA PAM 550-39, *supra* note 237, at 340-1; Jamaica (access to attorney), DA PAM 550-33, *supra* note 132, at 158; Jordan (access to attorney and attorney provided free of charge to indigents), DA PAM 550-34, *supra* note 237, at 274-6; Malaysia (access only), DA PAM 550-45, *supra* note 232, at 189; Peru (access only), DA PAM 550-42, *supra* note 232, at 212, 314; Portugal (access), DA PAM 550-181, *supra* note 238, at 268-70; Sudan (access to an attorney and attorney provided free of charge to indigents), DA PAM 550-27, *supra* note 232, at 211, 217; Turkey (access), DA PAM 550-80, *supra* note 233, at 367.

third-party protecting state or protecting international organization,[246] 6) periodic review of the grounds for detention,[247] 7) right to a *habeus corpus*[248] review of the legality of the detention,[249] and 8) a right to compensation for wrongful detention.[250]

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[246] Body of Principles, *supra* note 135, at princ. 16; Safety Convention, *supra* note 229, at art. 17(2):

> Any alleged offender shall be entitled:
> (a) To communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights; and
> (b) To be visited by a representative of that State or those States.

[247] Body of Principles, *supra* note 135, at princ. 11(3); GC, *supra* note 29, at art. 78.

[248] "The primary function of the writ [of habeus corpus] is to release from unlawful imprisonment . . .The office of the writ is not to determine prisoner's guilt or innocence, and only issue which it presents is whether prisoner is restrained of his liberty by due process." BLACK'S, *supra* note 31, at 709.

[249] Several treaties provide this right to detainees. International Covenant, *supra* note 20, at art. 4 ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."); American Convention, *supra* note 82, at art. 6:

> Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In State Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

European Convention, *supra* note 221, at art. 4 ("Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."). Two UN instruments provide this right as well. Body of Principles, *supra* note 135, at princ. 32 ("A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to

challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful."); 8th U.N. Congress, *supra* note 231, ¶ 2(g)(iii) ("Persons for whom pre-trial detention is ordered should be informed of their rights, in particular: . . . (iii) The right to have the validity of the detention determined by way of *habeus corpus, amparo,* or other means, and to be released if the detention is not lawful[;]"). At least 21 nations provide this right to criminal suspects in police custody. They include Australia, DEP'T OF ARMY, PAM 550-169, AREA HANDBOOK SERIES, AUSTRALIA, 411 (1974) [hereinafter DA PAM 550-169]; Costa Rica, DEP'T OF ARMY, PAM 550-90, AREA HANDBOOK SERIES, COSTA RICA, 188 (1984) [hereinafter DA PAM 550-90]; Dominican Republic, DA PAM 550-36, *supra* note 238, at 189; El Salvador, DEP'T OF ARMY, PAM 550-150, AREA HANDBOOK SERIES, EL SALVADOR, 151-155, 251 (1990) [hereinafter DA PAM 550-150]; Ghana, DEP'T OF ARMY, PAM 550-153, AREA HANDBOOK SERIES, GHANA, 295 (1995) [hereinafter DA PAM 550-153]; Honduras, DEP'T OF ARMY, PAM 550-151, 216-218, AREA HANDBOOK SERIES, HONDURAS, 151 (1995) [hereinafter DA PAM 550-151]; Ireland, IR. CONST. art. 40; Japan, DA PAM 550-30, *supra* note 238, at 471-2; Jordan, DA PAM 550-34, *supra* note 237, at 274-6; Liberia, DA PAM 550-38, *supra* note 232, at 213-4; Nicaragua, DA PAM 550-88, *supra* note 233, at 221-3; Pakistan, DA PAM 550-48, *supra* note 232, at 309-313; Panama, DA PAM 550-46, *supra* note 238, at 251-2; Paraguay, DA PAM 550-151, *supra* note 238, at 241-2; Peru, DA PAM 550-42, *supra* note 238, at 212, 314; Philippines, DEP'T OF ARMY, PAM 550-72, AREA HANDBOOK SERIES, PHILIPPINES, 298-9 (1993) [hereinafter DA PAM 550-72]; Portugal, DA PAM 550-181, *supra* note 238, at 268-70; Somalia, DA PAM 550-86, *supra* note 232, at 219-221; South Korea, DA PAM 550-41, *supra* note 232, at 202, 324-7; Spain, DA PAM 550-179, *supra* note 238, at 331-2; Venezuela, DEP'T OF ARMY, PAM 550-71, AREA HANDBOOK SERIES, VENEZUELA, 139-40 (1993) [hereinafter DA PAM 550-71].

[250] Two treaties provide detainees this right. International Covenant, *supra* note 20, at art. 5 ("Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."); European Convention, *supra* note 221, at art. 5 ("Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."). UN instruments providing this right include the Body of Principles. Body of Principles, *supra* note 135, at princ. 35 ("Damage incurred because of acts or omissions by a public official contrary to the rights contained in these Principles shall be compensated according to the applicable rules on liability provided by domestic law."). Nations providing this right include Nepal and Bhutan, DA PAM 550-35, *supra* note 232, at 153-4; Indonesia, DA PAM 550-39, *supra* note 237, at 340-1; South Korea, DA PAM 550-41, *supra* note 232, at 202, 324-327; Taiwan, CYCLOPEDIA, *supra* note 233, at 2A.40.41, § 1.8(A).

International law also supports a nation's right to deviate from its normal due process procedures in cases of "public emergency which threatens the life of the nation, . . ."[251] This departure from due process procedures prescribed in a nation's criminal code or constitution is known as "administrative detention" or "preventive detention."[252] All the major human rights treaties permit deviation from due process practices during public emergencies "to the extent strictly required by the exigencies of the situation."[253] The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC), which governs states' conduct during occupation, also permits the occupying power to "intern" occupants "for imperative reasons of security."[254] At least 38 states have enacted laws or constitutions that permit the government to deviate from normal due process procedures during "public emergencies,"[255] to include the U.S.[256]

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[251] International Covenant, *supra* note 20, at art. 4.

[252] ENCYCLOPEDIA, *supra* note 106, at 390-1. In its purest form, administrative detention involves no due process whatsoever - no charge, no trial, no term set for incarceration, and no legal review of the grounds for detention - although some countries' practice may vary. A.W.B. Simpson, *Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights*, 41 LOY. L. REV. 629 (Winter 1996) [hereinafter Simpson]. Nations also use administrative detention to confine the mentally ill or to enforce immigrations law. *Id.* The rights of detainees in these categories under customary international law are beyond the scope of this paper.

[253] International Covenant, *supra* note 20, at arts. 4 and 5; American Convention, *supra* note 82, at art. 27; European Convention, *supra* note 221, at art. 15; African Charter, *supra* note 221, at art. 11.

[254] GC, *supra* note 29, at art. 78.

[255] Algeria, DA PAM 550-44, *supra* note 232, at 281; Bahrain, DEP'T OF ARMY, PAM 550-185, AREA HANDBOOK SERIES, PERSIAN GULF STATES, 139, 354 (1994) [hereinafter DA PAM 550-185]; Bangladesh, DEP'T OF ARMY, PAM 550-175, AREA HANDBOOK SERIES, BANGLADESH, 153, 243 (1989) [hereinafter DA PAM 550-175]; Burma, DA PAM 550-61, *supra* note 233, at 261-2; Cameroon, DA PAM 550-166, *supra* note 232, at 135; Canada, UZI AMIT-KOHN, RENATO JARACH, CAROLINE B. GLICK, NISSIM BITTON, ISRAEL, THE

"INTIFADA" AND THE RULE OF LAW 116 (1993) [hereinafter ISRAEL]; Columbia, DEP'T OF ARMY, PAM 550-26, AREA HANDBOOK SERIES, COLUMBIA, 309-10 (1990) [hereinafter DA PAM 550-26]; El Salvador, EL SAL . CONST. art. 29; Egypt, DA PAM 550-43, *supra* note 233, at 343; Finland, DA PAM 550-167, *supra* note 233, at 341; Guatemala, DEP'T OF ARMY, PAM 550-78, AREA HANDBOOK SERIES, GUATEMALA, 211 (1984) [hereinafter DA PAM 550-78]; Honduras, DEP'T OF ARMY, PAM 550-151, AREA HANDBOOK SERIES, HONDURAS, 151 (1990) [hereinafter DA PAM 550-151]; India, DA PAM 550-21, *supra* note 232, at 617; Ireland, Raphael Cohen-Almagor, *Administrative Detention in Israel and its Employment as a Means of Combating Political Extremism*, 9 N.Y. INT'L L. REV. 1 (Summer 1996) [hereinafter Cohen]; Israel, *Id.*; Jordan, DA PAM 550-34, *supra* note 237, at 274-6; Kenya, DEP'T OF ARMY, PAM 550-56, AREA HANDBOOK SERIES, KENYA, 185 (1984) [hereinafter DA PAM 550-56]; Kuwait, DA PAM 550-185, *supra* this note, at 348; Madagascar, DA PAM 550-154, *supra* note 233, at 307; Malawi, DEP'T OF ARMY, PAM 550-172, AREA HANDBOOK SERIES, MALAWI, 166 (1975) [hereinafter DA PAM 550-172]; Malaysia, DA PAM 550-45, *supra* note 232, at 189; Mauritius, DA PAM 550-154, *supra* note 233, at 313; Nigeria, DA PAM 550-157, *supra* note 232, at 308; Nicaragua, DA PAM 550-88, *supra* note 233, at 221-3; Pakistan, DA PAM 550-48, *supra* note 232, at 309-313; Peru, DA PAM 550-42, *supra* note 237, at 314; Seychelles, DA PAM 550-154, *supra* note 232, at 244, 321; Singapore, DEP'T OF ARMY, PAM 550-184, SINGAPORE, 181 (1991) [hereinafter DA PAM 550-184]; Somalia, DA PAM 550-86, *supra* note 232, at 158, 219; Spain, SPAIN CONST. art. 55; Sri Lanka, DEP'T OF ARMY, PAM 550-96, SRI LANKA, 257, 261 (1990) [hereinafter DA PAM 550-96]; Sudan, DA PAM 550-27, *supra* note 232, at 211, 217; Tanzania, DEP'T OF ARMY, PAM 550-62, TANZANIA, 261 (1978) [hereinafter DA PAM 550-62]; Thailand, DEP'T OF ARMY, PAM 550-53, THAILAND, 185 (1989) [hereinafter DA PAM 550-53]; Tunisia, DEP'T OF ARMY, PAM 550-89, TUNISIA, 210, 222 (1987) [hereinafter DA PAM 550-89]; Turkey, DA PAM 550-80, *supra* note 233, at 367-8; United Kingdom, Simpson, *supra* note 252, at 1; Sudan, DA PAM 550-27, *supra* note 232, at 217; Zimbabwe, DEP'T OF ARMY, PAM 550-171, ZIMBABWE, 202 (1983) [hereinafter DA PAM 550-171].

One source claims that, as of January 1985, at least 85 countries have legislation permitting this practice. Newsletter, International Commission of Jurists, No. 24 (Jan/March 1985), at 53. Since 1985, the U.N. Commission on Human Rights has examined the question of administrative detention resulting from a nation's declaration of a state of emergency. ENCYCLOPEDIA, *supra* note 106, at 1407-1409; *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*, U.N. Economic and Social Council Commission on Human Rights, 52d Sess., item 8, U.N. Doc. E/CN.4/1996/30 (1995). According to this Commission, 87 countries have proclaimed or extended states of national emergency since January 1, 1985. *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*, U.N. Economic and Social Council Commission on Human Rights, 48th Sess., Item 10(a) of the Provisional Agenda, at II, ¶ 37, E/CN.4/Sub.2/1996/19 (1996).

[256] The U.S. has also practiced administrative detention in national emergencies. Art. I, section 9, clause 2 of the U.S. Constitution grants limited emergency powers to suspend some due process: "The privilege of the Writ of Habeus Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. The President may also exercise emergency powers by executive order and by the authority granted under congressional legislation. MICHAEL LINFIELD, FREEDOM UNDER FIRE, U.S. CIVIL LIBERTIES IN TIMES OF WAR, 129, 131 (1990) [hereinafter Linfield].

"[A]dministrative detention was widely practiced in the United States during the Civil War on the basis of President Abraham Lincoln's directive to suspend the writ of habeus corpus following the attack by Confederate Forces on Fort Sumter in April, 1861. . . . Congress in 1863 directly authorized the President to suspend habeus corpus, and the principle of arrest without a writ of habeus corpus during times of grave national emergency was recognized as constitutional by the U.S. Supreme Court in the 1866 decision of Ex parte Milligan [18 L.Ed. 281 (1866)]. It is estimated that during the Civil War, between 20,000 and 30,000 American civilians were detained in military custody 'simply because those person were suspected of being disloyal, dangerous, or disaffected.'" ISRAEL, *supra* note 255, at 112.

"The most famous instance of administrative - or preventative - detention by a democracy is, of course, that of the Nisei, those Japanese-Americans interned en masses for a period of two years or more following the Japanese attack on Pearl Harbor. Some 109,650 civilian men, women and children of Japanese ancestry - the entire West Coast population of Japanese-Americans including some 70,000 American-born U.S. citizens - were interned under powers granted by Executive Order no. 9066 of 19 February, 1942 which was retroactively approved by Act of Congress on 21 March, 1942 (18 U.S.C.A., Section 97a). The sole criterion for the imposition of such detention was the ethnic group to which the detainees belonged. The U.S. Supreme Court upheld the widespread administrative actions against Japanese Americans first in Gordon Hirabayashi v. United States [320 U.S. 81 (1943)] and then in Fred Korematsu v. United States [323 U.S. 214; 65 S.Ct. 193; 89 L.Ed. 194 (1944)] as 'proper security measures' taken by military authorities empowered by Congress who 'decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily . . .' . . .in Ex parte Endo [323 U.S. 283 (1944)] the Court finally held that the government was not empowered to continue to detain a citizen of Japanese ancestry 'who is concededly loyal.' The Court did so, however, on the basis of its interpretation of the Congressional Act and the Executive Order under which the detention was ordered, without discussion of the constitutional aspects of the case and without declaring the entire practice of internment of Japanese-Americans on the basis of ancestry, illegal." *Id.* at 112-113. Under section 105 of the Civil Liberties Act of 1988, the U.S. Government must provide redress to American citizens and permanent resident aliens of Japanese ancestry who were forcibly evacuated, relocated, and interned by the U.S. government during the Second World War. Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment, U.N. Economic and Social Council, 52d Sess., Agenda Item 8, at ¶ 23, U.N. Doc. E/CN.4/1996/29/Add. 2 (1996).

The legal challenge of administrative detention lies in limiting due process deprivations to only those necessary to help restore national security, and then only for the most limited time period possible. This balancing test seldom justifies eliminating due process procedures entirely. Under states of emergency, most countries' laws or constitutions permit increasing the number of days before which the police must bring a criminal suspect before a judge or magistrate to decide upon continued detention.[257] Case law lends little to this examination of what due process procedures many be changed or eliminated under a state of emergency, since the decisions are very erratic and fact-specific.[258]

2. Constitutional Bases for Suit--

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[257] Algeria, DA PAM 550-44, *supra* note 232, at 281 (increase from 48 hours to 12 days); El Salvador, EL SAL . CONST. art. 29 (increase from 72 hours to 15 days); Egypt, DA PAM 550-43, *supra* note 233, at 343 (increase from 48 hours to 30 days); Spain, SPAIN CONST. art. 55 (increase from 72 hours to 3 days); Sri Lanka, DA PAM 550-96, *supra* note 238, at 257-262 (increase from 24 hours to 72 hours); Turkey, DA PAM 550-80, *supra* note 233, at 367-8 (increase from 24 hours to 48 hours or 15 days depending on crime).

[258] Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. A) at 15 (1979) (5 month detention without review by a judge and without trial not a violation of the European Convention's prohibition on arbitrary detention where a state of emergency existed and where detainee could have his detention reviewed by a commission upon request); Brannigan and McBride v. United Kingdom, 17 Eur. Ct. H.R. 539 (ser. A) at 539 (1994) (Detention of six days without review by a magistrate not a violation of the European Convention's prohibition on arbitrary detention where state of emergency existed and detainee could have petitioned for *habeus corpus*); Brogan and Others v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) at 117 (1989) (Four days and six hours before appearance before magistrate excessive where detaining power had not made a formal declaration of its intention to deviate from due process standards under a state of emergency).

Some federal courts, to include the U.S. Supreme Court, have held that aliens who encounter official U.S. action outside the territorial limits of the U.S. receive a certain amount of protection under the Constitution. Federal courts have ruled these aliens have a Fifth Amendment right not to be arbitrarily deprived of property[259] and a Fourth Amendment right to be free of unreasonable searches and seizures.[260] Citizens of U.S. territories also have certain constitutional rights.[261]

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[259] U.S. v. Caltex, Inc., 344 U.S. 149, 73 S.Ct. 200, 97 L.Ed. 157 (1952) (Court considers claims for compensation under the Fifth Amendment by alien corporations for takings in the Philippines); Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102, 107 S.Ct. 1026 (1987) (Exercise of personal jurisdiction by California court over Japanese manufacturer of valve stems would exceed the limits of due process, absent action by manufacturer to purposefully avail itself of the California market.). *But see* Kukatush Mining Co. v. SEC, 309 F.2d 647 (D.C.Cir. 1962) (denying standing to Canadian corporation with no assets in the U.S. to seek injunction to have its name stricken from "restricted list.").

[260] United States v. Streifel, 665 F.2d 414 (2d Cir. 1981) (Principles of investigatory stops on land are applicable to official U.S. action on the high seas.); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (Federal district court's criminal process would be degraded if it were executed against an Italian citizen whose presence in court was allegedly procured by being kidnapped, drugged and forcibly transported to the U.S. by U.S. officials. Defendant was entitled to a hearing on these allegations.). *But see* U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990) (Fourth Amendment does not apply to a search of a noncitizen's home outside the territorial U.S. by U.S. agents); U.S. v. Alvarez-Machain, 504 U.S. 655 (1992) (Fourth Amendment does not apply to the seizure of a noncitizen from outside the U.S. for prosecution in a U.S. court).

[261] United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. Berlin 1979) (Polish national tried in Berlin under U.S. post-war occupation authority had a Constitutional right to trial by jury); Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977) and Nitol v. United States, 7 Cl.Ct. 405 (1985) (Governmental taking of property from inhabitants of the Pacific Trust Territories without due process violates their Fifth Amendment protected property interest.). *But see* Government of Canal Zone v. Scott, 502 F.2d 566 (5th Cir. 1974) ("The constitution does not require the extension of all protections of the bill of rights to territories governed by the United States."); Dostal v. Haig, 652 F.2d 173 (D.C.Cir. 1981) (Failure of U.S. post-war occupation authority to provide judicial forum did not deny alien plaintiffs due process).

While a detainee has yet to sue the U.S. for arbitrary detention during an OOTW, alien asylees, detained by the Immigrations and Naturalizations Service (INS) outside of the U.S., have done so. A district court has held that the Fifth amendment protects these asylees when American officials arbitrarily detain and mistreat them in an area outside the territorial U.S. under exclusive U.S. jurisdiction and control. This precedent may open another door for detainees who want to sue the U.S. for arbitrary detention and maltreatment. It may spell disaster for U.S. military detention operations in future OOTW, unless the military formulates uniform procedures to comply with this case's holding.

This case is Haitian Center Council Inc., v. Sale (Sale),[262] a 1993 United States District Court case from the Eastern District of New York. In 1991, the INS ordered the

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[262] 823 F.Supp. 1028 (E.D.N.Y. 1993), *vacated by* Stipulated Order Approving Class Action Settlement (Feb. 22, 1994) [hereinafter Sale]. This case has a complex procedural history. In March 1992, the plaintiffs initially sought an injunction against the U.S. government for refusing to allow the Haitian Centers Council, Inc. access to the asylees at Guantanamo. The Eastern District of New York granted the plaintiffs' request, issuing a temporary restraining order on March 27, 1992, and a preliminary injunction on April 6, 1992. The government appealed to the Second Circuit and asked the Supreme Court for a stay of the order pending the Second Circuit's disposition of the appeal. The Supreme Court granted this request. On June 10, 1992, the Second Circuit affirmed and modified the preliminary injunction from the Eastern District on New York in Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992). The government appealed this decision. The Supreme Court granted certiorari to the government's petition, but vacated the decision as moot because the government had substantially altered its Haitian refugee policy. Sale v. Haitian Centers Council, Inc., 509 U.S. 913, 113 S.Ct. 3028, 125 L.Ed.2d 716 (1993).

On May 24, 1992, President Bush issued an executive order directing the U.S. Coast Guard to return any Haitian interdicted beyond the territorial waters of the U.S. directly to Haiti without undergoing INS screening at Guantanamo. The plaintiffs quickly moved for another temporary restraining order and preliminary injunction to restrain the

Coast Guard to interdict refugees fleeing Haiti by boat after the overthrow of President Jean-Bertrand Aristide, Haiti's first democratically elected president.[263] The Coast Guard brought these detainees to a camp run by a U.S. military Joint Task Force (JTF) at Guantanamo Bay Naval Base.[264] Haitians found to have a "credible fear of return" to Haiti stayed at the camp for more processing, while the INS returned those who did not meet this standard back to Haiti.[265] The INS decided to test those who had met the "credible fear" standard (the "screened in" detainees) for the human immonodeficiency virus (HIV).[266] The INS then separated those who tested positive for HIV from the other Haitians.[267] It required them to meet a more stringent standard, a "well-founded fear" of

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government from carrying out this executive order. The Eastern District of New York denied this request on June 6, 1992. The plaintiffs appealed to the Second Circuit, which reversed the Eastern District's order in Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350 (2d Cir. 1992). As a result, the Eastern District of New York issued the injunction. The government again petitioned the Supreme Court for a stay pending filing of a writ of certiorari, which the Supreme Court granted in McNary v. Haitian Centers Council, Inc., 506 U.S. 814, 113 S.Ct. 52, 121 L.Ed.2d 22 (1992). The plaintiffs requested that the Executive Order issues be bifurcated from the due process issues in this case, which the Eastern District of New York granted. Sale is the Eastern District's case which resolved the due process issues, rendered on June 8, 1993. The Supreme Court ruled in the Executive Order issues shortly thereafter. Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993).

[263] Sale, 823 F.Supp. 1034.

[264] The U.S. had actually begun interdicting Haitian-flagged vessels in 1981 pursuant to an agreement with Haiti. The rate of Haitian flight increased dramatically after President Aristide's overthrow, necessitating a change in procedures. *Id,* at 1034.

[265] *Id.* at 1035.

[266] *Id.*

[267] *Id.*

return to Haiti, before admission to the U.S. for asylum processing.[268] The INS refused to allow the HIV positive asylees access to retained attorneys before or during these screening interviews.[269]

While awaiting for INS's decision on their asylum petitions, the asylees at Guantanamo received medical care commensurate with U.S. standards, except for those who had developed the acquired immonodeficiency syndrome (AIDS).[270] The military doctors requested in May 1992 that the INS evacuate certain HIV positive patients from Guantanamo because of their belief that the military medical facilities could not provide these patients adequate care.[271] The INS denied these requests for the most part.[272]

Also, while awaiting the outcome of their screening interviews, the camp commanders maintained camp discipline and order by occasionally placing certain detainees in "administrative segregation."[273] This involved placing the asylee in a confinement facility isolated from the main camp for a few days or a few weeks.[274] Before taking this step, the camp commander informed the asylee of the charges against

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[268] *Id.*

[269] *Id.* at 1036.

[270] *Id.* at 1038.

[271] *Id.*

[272] *Id.*

[273] *Id.* at 1044.

[274] *Id.*

him and provided an opportunity to respond.[275] The senior military officer consulted with the camp president (Haitian elected by the asylee to represent them) before making a decision on the punishment.[276]

Some of the Haitian asylees at Guantanamo joined with a New York-based legal service organization and other service organizations to sue the acting commissioner of the INS and other U.S. officials.[277] The Haitians sued the INS for inadequate medical care, arbitrary punishment, indefinite detention and lack of access to counsel during the second set of screening interviews at Guantanamo.[278],[279]

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[275] *Id.*

[276] *Id.*

[277] The Haitian Centers Council, Inc., along with two other assistance groups, four "screened-in" Haitian detainees, and two immediate relatives of screened in Haitian detainees sued the acting INS commissioner, the U.S. Attorney General and Secretary of State, two Coast Guard commandants and the commander of the Guantanamo Bay Naval Base. The court refused to certify the class of immediate relatives and dismissed their claims because these plaintiffs presented no evidence on their claims. *Id.* at 1034.

[278] *Id.* at 1034.

[279] Other causes of action were denial of Haitian service organizations' First Amendment rights to provide advocacy and counseling to their clients detained on Guantanamo; denial of the Haitian detainees' First and Fifth Amendment rights to obtain and communicate with counsel; denial of the Haitian detainees' constitutional due process right to adequate medical care and freedom from arbitrary punishment; arbitrary and capricious agency action not in accordance with law; judicial enforceability of the duty of non-refoulement; and equal protection. *Id.* at 1034-1036. The Court dismissed a seventh claim, "failure of the Government to follow rulemaking procedures," pursuant to Rule 12(b)(6). *Id.* at 1035.

Judge J. Sterling Johnson Jr. held that aliens, outside the territorial U.S., detained by official U.S. action in an area where the U.S. has "complete control and jurisdiction,"[280] have a due process right under the Fifth Amendment not to be arbitrarily or indefinitely detained.[281] He also held that they had a right to be free from wrongful repatriation to Haiti because the INS denied them access to counsel during the second set of interviews.[282] He also held that the lack of disciplinary proceedings and inadequate medical care for the HIV positive detainees "denied the detainees of due process of law.[283]"

The judge also noted that "[c]onstitutional and other fundamental rights apply to citizens and noncitizens outside United States who encounter official U.S. action."[284] In support of this assertion, he pointed out that "[t]he Due Process Clause is phrased in universal terms, protecting any 'person,' rather than members of 'the people.'"[285] He also ruled that the "constitution limits the conduct of United States personnel with

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[280] *Id.* at 1040.

[281] *Id.*

[282] *Id.*

[283] He also ruled that denying the Haitian Service Organizations access to the detainees violated the First Amendment and that the "well-founded fear" processing coupled with the Attorney General's decision not to parole the detainees violated the Administrative Procedures Act (APA). *Id.* at 1049-1050. The Court never reached the equal protection claim since it had ruled for the plaintiffs on other grounds. *Id.* at 1049.

[284] *Id.* at 1041.

[285] *Id.*

respect to officially authorized interactions with aliens brought to and detained by such personnel on a land mass exclusively controlled by the United States."[286]

The Court further determined that the INS could not deny the Haitian detainees their "liberty interest in not being arbitrarily . . . detained,"[287] and liberty interest in "not being wrongly repatriated to Haiti"[288] without due process. It determined that "due process forbids governmental conduct that is deliberately indifferent to the medical needs of non-convicted detainees."[289] Finally, it determined that "when a 'major change in the conditions of confinement' is imposed as punishment for a specific infraction, . . . the Due Process Clause requires a constitutionally adequate process."[290] Judge Johnson ruled that this "constitutionally adequate due process" required "written notice of the allegations, a hearing, a written decision, and opportunity to call witnesses and present evidence, access to counsel, and an impartial decisionmaker."[291]

Could a federal court enjoin the operation of a detainee facility operated by the U.S. military during an OOTW? Both Sale and OOTW detentions involve aliens detained by the U.S. government officials in areas subject to the "complete control and jurisdiction of

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[286] *Id.*

[287] *Id.* at 1045.

[288] *Id.* at 1042.

[289] *Id.* at 1044.

[290] *Id.*

[291] *Id.*

the United States government"[292] outside of U.S. territorial limits. In Sale, the U.S. had de jure control and jurisdiction over the detention area as evidenced by the wording of the Base's lease agreement between the United States and Cuba.[293] Even without a well-worded lease, a good argument exists that a military-run detainee facility is an area under de facto U.S. "control and jurisdiction" for purposes of Sale's grant of due process. While the U.S. may not have *de facto* jurisdiction over host nation civilians in OOTW, the U.S. should have undisputed authority over a detainee facility and the civilians within it during OOTW.[294]

Furthermore, both Sale and the OOTW detainees involve denials of a protected liberty interest. In Sale, the INS violated the Haitian asylum seekers' due process right to liberty by denying them access to counsel.[295] In the same manner, OOTW detainees can cite Sale when arguing that U.S. military officials deprived them of their due process right to liberty by denying them access to counsel.

The Sale detainees were innocent aliens seeking asylum to the U.S. On the other hand, the U.S. detains civilians in OOTW because of their allegedly criminal conduct.

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[292] *Id.* at 1040.

[293] "[D]uring the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas." *Id.*, at 1036.

[294] Whitaker, *supra* at 20, at 25.

[295] Sale, 823 F.Supp. at 1049.

However, this distinction does not effectively distinguish the cases. As noted in Sale, the Supreme Court and Ninth Circuit have held that while a detainee's alleged criminal status or national security risk can justify continued detention, it cannot justify arbitrary detention.[296] Both asylum applicants and suspected criminals have protected due process liberty interests in not being arbitrarily detained.

The Sale detainees had already been "screened" once by the INS, and had been in detention for two years when Judge Johnson issued his ruling.[297] However, that does not mean that the Sale detainees merit more due process rights than would detainees in OOTW. Even though Sale stated in dicta that "[a]s the Haitians' ties to the United States have grown, so have their due process rights,"[298] the Supreme Court case cited in Sale to support this point explains this a little differently. Johnson v. Eisentrager[299] seems to indicate that due process rights indeed increase based on progress toward U.S. citizen status, beginning with an alien's "[m]ere lawful presence in the country."[300] Neither the Sale detainees nor the OOTW detainees would have set foot inside the territorial limits of the U.S.; therefore, their due process rights would be on equal standing.

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[296] Shaughnessy v. U.S., 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953); Alvarez-Mendez v. Stock, 941 F.2d 956 (9th Cir. 1991). *See* Haitian Centers Council Inc. v. Sale, 823 F.Supp. at 1045.

[297] *Id.* at 1042.

[298] *Id.*

[299] Johnson v. Eisentrager, 339 U.S. 763, 770-71, 70 S.Ct. 936, 939-40, 94 L.Ed. 1255 (1950).

[300] *Id.* at 940.

No case has cited Sale's holding regarding aliens' Constitutional due process rights not be arbitrarily detained. It stands alone, either as a legal breakthrough in law or an unfortunate aberration.[301] How the appellate courts would have ruled on this case is still a question because the Clinton administration never appealed Sale. Instead, this administration admitted the HIV positive Haitians into the U.S. for asylum processing.[302] Judge Johnson's ruling in Sale had apparently embarrassed President Clinton, who had previously criticized his predecessor's policies toward the detainees as "lacking in compassion."[303] Taking this case to the Supreme Court was a battle President Clinton chose not to fight.

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[301] The Second Circuit did indicate some support for the ruling. While affirming Judge Johnson's preliminary injunction that prevented the INS from returning the detainees to Haiti, this court indicated that there were "serious questions going to the merits of the 'screened in' plaintiffs' fifth amendment due process claims. Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326, 1342 (2d Cir. 1992).

[302] *See* Lia Macko, *Acquiring A Better Global Vision: An Argument Against the United States' Current Exclusion of HIV-Infected Immigrants*, 9 GEO. IMMIGR. L.J. 546 (Summer 1995).

[303] *A Test of Conscience*, ST. LOUIS POST-DISPATCH, June 17, 1993 at 2C:

> Haiti stands as a stunning rebuke to Bill Clinton's promises for a foreign policy that stands unambiguously for democracy and human rights. Once elected, President Clinton spared little time in adopting President George Bush's policies on Haitian refugees, positions he had strongly criticized during the campaign as lacking in compassion, as well as Mr. Bush's lackadaisical approach to pressuring the Haitian military. What could have been an early foreign-policy success for the neophyte president now stands as just another example of reticence and indecision. One of the sorriest legacies of President Bush was the lingering presence of 158 Haitians at the Guantanamo naval base. These were Haitians who, even the U.S. government realized, could not be returned to Haiti because of the prospect of persecution or death, but they were denied entry to the United States because they are HIV-positive or related to a detainee who is HIV-positive. Though candidate Clinton objected to their languishing in limbo, it took a federal

judge, Sterling Johnson Jr. of the district court in Brooklyn, to order their release from what he described as "an HIV prison camp." The judge emphasized the fundamental injustice of indefinite imprisonment. The Clinton administration announced it wouldn't appeal the judge's decision - a lame and unsatisfying response - and the Haitians have begun to be admitted to this country. . . .

Id. *See also* Timothy J. McNulty, *The Marking of the President,* CHICAGO TRIB., April 25, 1993, at 12C ("Only days after taking office, [President Clinton] clumsily reversed a campaign pledge on Haitian refugees, . . ."); Pete Bowles, *Freed at Last; Judge Orders the Release of HIV Haitians,* THE HOUSTON CHRONICLE, June 9, 1993, at A1 ("Johnson, . . . said he was particularly disturbed that witness Duane Austin, an official of the U.S. Immigration and Naturalization Service, was quoted in an interview as saying of the detainees: 'They're going to die anyway, aren't they?' . . . Spokeswomen for Attorney General Janet Reno and Chris Sale, acting commissioner of INS, said the ruling is being reviewed and declined to comment further."); *A Test of Conscience,* ST. LOUIS POST-DISPATCH, June 17, 1993 at 2C:

> Haiti stands as a stunning rebuke to Bill Clinton's promises for a foreign policy that stands unambiguously for democracy and human rights. Once elected, President Clinton spared little time in adopting President George Bush's policies on Haitian refugees, positions he had strongly criticized during the campaign as lacking in compassion, as well as Mr. Bush's lackadaisical approach to pressuring the Haitian military. What could have been an early foreign-policy success for the neophyte president now stands as just another example of reticence and indecision. One of the sorriest legacies of President Bush was the lingering presence of 158 Haitians at the Guantanamo naval base. These were Haitians who, even the U.S. government realized, could not be returned to Haiti because of the prospect of persecution or death, but they were denied entry to the United States because they are HIV-positive or related to a detainee who is HIV-positive. Though candidate Clinton objected to their languishing in limbo, it took a federal judge, Sterling Johnson Jr. of the district court in Brooklyn, to order their release from what he described as "an HIV prison camp." The judge emphasized the fundamental injustice of indefinite imprisonment. The Clinton administration announced it wouldn't appeal the judge's decision - a lame and unsatisfying response - and the Haitians have begun to be admitted to this country. . . .

Id.

Recent cases give one the impression that the federal courts are reversing their trend of granting aliens outside the U.S. constitutional rights.[304] However, most of these recent cases deal with Fourth Amendment rights, not Fifth Amendment rights, as in Sale. This is significant, as the Supreme Court notes in one of these cases, because the Fourth Amendment "operates in a different manner than the Fifth Amendment."[305] The Court also noted in this case that the Fourth Amendment applies to "the people," which implies Americans only, while the Fifth Amendment applies more expansively to "no person."[306] The Ninth Circuit has recently held that a Fifth Amendment due process violation, committed by a U.S. official against an alien outside of the U.S., must rise to the level of "outrageousness" before it justifies dismissing that alien's federal court prosecution. This court stated in dicta that, despite this holding, aliens faced with official U.S. action outside of the U.S. still have some Fifth Amendment due process rights.[307]

The military needs to take the Sale ruling seriously. The ramifications of granting detainees constitutional rights reach far into the operation of military detention facilities

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[304] Cuban American Bar Association Inc. v. Christopher, 43 F.3d 1412 (11th Cir. 1995) *cert. den.* 115 S.Ct. 2578, 132 L.Ed.2d 828 (1995) and by 116 S.Ct. 299, 133 L.Ed.2d 205 (1995) (Cuban and Haitian migrants in safe haven outside the U.S. have no constitutional rights.); Haitian Refugee Center v. Baker, 953 F.2d 1498, at 1513 (11th Cir. 1992) *cert. den.* (502 U.S. 1122, 112 S.Ct. 1245, 117 L.Ed.2d 477 (1992) ("[T]he indicted Haitians have no recognized substantive rights under the laws or Constitution of the United States.).

[305] U.S. v. Verdugo-Urquidez, 494 U.S. 259, 264, 110 S.Ct. 1056, 1060, 108 L.Ed.2d 222 (1990).

[306] *Id.* at 265-6.

[307] Alvarez-Machain v. U.S., 96 F.3d 1250, 1251 (9th Cir. 1996).

in OOTW. Armed with the U.S. Constitution, detainees would have grounds for standing under the Administrative Procedures Act.[308] They could sue military officials for commission of constitutional torts.[309] They could petition for habeus corpus.[310] The military would have to react to these suits, unless it had already taken the lead and developed uniform detainee procedures that incorporate Sale's holdings.

C. Practical Reasons for Uniform Procedures

The previous section has described the many adverse risks of continuing with the status quo and not developing uniform procedures. This section describes the positive aspects of simplifying the complicated customary international law on detainees into a

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[308] The Administrative Procedures Act, 5 U.S.C. §§ 702, 706 (1994) [hereinafter APA]. Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), outlines the legal framework to review challenges to military decisions under the APA. First, the court looks at whether the claimant alleged either a deprivation of a constitutional right or a violation by the military of relevant statutes or regulations, and, second, it looks at whether the claimant exhausted all "available intraservice corrective measures." Exhausting all "available intraservice corrective measures" does not pose an obstacle for detainees, since there are no administrative appeal measures available to them. The aliens could not prove a violation by the military of relevant statutes or regulations, since there are no relevant statutes or regulations on this subject. Proving deprivation of constitutional right would depend on whether the court accepts Sale's holding that arbitrary detention of aliens by U.S. officials in an area of exclusive U.S. jurisdiction violates the aliens' constitutional rights under the Fifth Amendment due process clause. *See* William T. Barto, *Judicial Review of Military Administrative Decisions After Darby v. Cisneros*, ARMY LAW. Sept. 1994, at 9.

[309] *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 9 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

[310] 28 U.S.C. § 2241 (1994). This statute enables one who is "in custody under or by the color of the authority of the United States . . . or he is in custody in violation of the Constitution or laws or treaties of the United States" to apply for a writ of habeus corpus.

cohesive body of uniform procedures. These include improved training and enforcement, improved relations with the media and human rights groups, and enhanced respect for the rule of law. The benefits of becoming a leader in this area by developing uniform procedures far outweigh the risks of continuing with the status quo.

1. The Complicated International Law on Detainees--

In Operation Restore Hope, the command derived their detainee procedures largely upon force protection needs balanced against sparse logistical assets.[311] While planners seemed to have given some consideration to Common Article 3 of the Geneva Conventions, no other aspect of international law seems to have entered into development of these detainee procedures.[312] In Operation Uphold Democracy, development of the detainee due process system incorporated the Geneva Conventions, the Universal Declaration of Human Rights and the Haitian Constitution.[313]

Detainee procedures need to extend beyond these sources of law. Extensive analysis of international law needs to figure prominently in the development of any system of detainee due process procedures. For example, international law recognizes two main opposing tenets regarding the due process rights of detainees. One is the prohibition of arbitrary detention, and the other is a state's ability to temporarily suspend detainee due

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[311] OPERATION RESTORE HOPE AFTER ACTION REPORT/LEGAL LESSONS LEARNED, ¶ 29C (Apr. 12, 1993) [hereinafter Somalia Lessons Learned].

[312] Somalia Legal AAR, *supra* note 61, at ¶ F2.

[313] HAITI AAR, *supra* note 6, at 61 and 68.

process rights for reasons of national security or emergency. Any determination of detainee due process rights needs to strike a balance between these well-established tenets.

Performing this extensive legal analysis will keeps the U.S. out of court. It will give the military the confidence that comes from the knowledge that careful legal analysis went into development of its procedures. It is easier to perform this analysis while developing a uniform procedure well ahead of the actual deployment, instead of during the frantic days preceding it, or during the operation itself.[314]

2. Uniform Procedures will Improve Training and Enforcement--

Successful Army training hinges upon standardizing those tasks that the soldiers need to know, and then practicing those tasks over and over until they become second nature.[315] This standardizing becomes even more important when the task requires teamwork.[316] Given the inevitable personnel turn-overs, shortages and reserve

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[314] The commands developed the due process procedures for detainees during Operations Restore Hope and Uphold Democracy while in theater, after detentions had begun. *See* Lorenz, *supra* note 6, at 34; Interview with Darryl Wishard, Judge Advocate for the 10th Mountain Division during Operation Uphold Democracy (January 11, 1997) [hereinafter Wishard Interview] (although a great deal of planning preceded the deployment, the last-minute change in entry method from hostile to semi-permissive forced in-theater development of due process procedures).

[315] *See* DEP'T OF ARMY, REGULATION 350-1, ARMY TRAINING, ¶ 1-7 (1 August 1981) (w/C1, 1 August 1983) [hereinafter AR 350-1].

[316] *See* DEP'T OF ARMY, REGULATION 350-41, TRAINING IN UNITS, ¶ 3-8 (19 March 1993).

augmentations connected with every deployment,[317] an authoritative set of procedures for all soldiers who must work together to perform a certain task is invaluable. These uniform procedures help to eliminate the confusion and group struggles that are a part of human nature.

As Army missions change, the tasks that comprise those missions change as well. As the Army takes on new types of missions, it needs to standardize these new tasks.[318] Running a civilian detainee facility is one of those new tasks. It is a task that requires teamwork. The military needs to standardize it.

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[317] *See* Joseph H. Davies, *American Global Logistics and Peace Operations, in* ESSAYS ON STRATEGY XIII 264-5, 279, 284 (Mary A. Sommerville ed. 1996) [hereinafter Davies];

> Following the Vietnam conflict, the Army divested itself of much of its active combat support and combat service support force structure, by transferring many of these units into the reserve component. Sometimes referred to as the "Abrams doctrine" (after then Army Chief of Staff, General Creighton W. Abrams, Jr.), the Total Force is designed so large military operations cannot be sustained without the Reserves, and with them, the consent of the American public in their commitment.

quoting HARRY G. SUMMERS, ON STRATEGY II: A CRITICAL ANALYSIS OF THE GULF WAR. With the exception of Operation Uphold Democracy, since Desert Storm the President has chosen not to call up entire reserve units when needed for major deployments. He has chosen the more politically advantageous option of relying upon individual reservist volunteers to fill active duty shortfalls for these deployments. This wreaks havoc with unit training. The Department of Defense, in an effort to obtain easier access to reserve forces, backed a 1994 legislative effort to give the Secretary of Defense authority for a 25,000-person reserve component call-up. This legislation was never approved. It appears unlikely that Congress will relinquish authority to an unelected official. *Id.*

[318] *See* AR 350-1, *supra* note 315, at ¶ 5-4.

a. Military Police Training--

Military Police (MP) soldier training would particularly benefit from uniform detainee standards. Current Army doctrine places responsibility for battlefield circulation control, area security, law and order, and EPW/CI facility operations on the shoulders of MP soldiers.[319] OOTW have placed a high premium on these police skills. As a result, the Army has tasked MP soldiers to their limit since Operation Desert Storm:

> As of late 1994, over 2,700 Army Military Police were deployed in Guantanamo Bay, Haiti, Panama, Honduras and Kuwait, representing over one-quarter of active Army military police and greater than 40 percent of all FORSCOM [Forces Command] military police units. As a result, in early 1995 all deployable FORSCOM military police units were either preparing for, recovering from, or deployed to support various contingencies.[320]

However, the MP branch uses little more than one-third of its personnel to shoulder this increased involvement in peace operations as well as their normal garrison duties. Reservists comprise almost two-thirds of the Army's MP units.[321] President Clinton has chosen not to activate reservist MP units for recent OOTW (except for a selected activation of MP reservists during Operation Uphold Democracy).[322] Instead, he has chosen the more politically advantageous option of relying upon individual reservist

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[319] Draft FM 19-1, *supra* note 158, at v. Emerging doctrine from the MP school will respond to the challenges presented by OOTW by rearranging and augmenting the MP responsibilities into five new categories: Maneuver and mobility support operations, areas security operations, internment and resettlement operations, law and order operations, and police intelligence operations. *Id.* at vi.

[320] Davies, *supra* note 317, at 264.

[321] *Id.*

[322] *Id.*

volunteers to fill active duty shortfalls for major deployments.[323] As a result, MP units that are about to deploy must suddenly incorporate new soldiers, who have never previously trained with them, into their unit missions. This factor, on top of the normal military personnel turnover, makes training a nightmare for MP commanders. This policy of calling for individual volunteer reservists to augment deploying active duty units for peace operations shows no sign of disappearing.[324]

These MP training issues become even more pronounced with enemy prisoner of war (EPW) and detainee operations. While all MP soldiers receive initial training on EPW camp operations, only one brigade, a reserve unit, specializes in their operation.[325] President Clinton has chosen not to activate soldiers from this unit during his administration, even though detainee facilities became necessary in both Operation Restore Hope and Uphold Democracy.[326] As a result, scarce active duty MP asset spread themselves out over a wider range of missions during deployments, to include detainee facility operations. This scarcity became so acute during Operation Just Cause that

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[323] *Id.*

[324] *Id.* at 265. DoD, in an effort to obtain easier access to reserve forces, backed a 1994 legislative effort to give the Secretary of Defense authority for a 25,000-person reserve component call-up. This legislation was never approved. It appears unlikely that Congress will ever relinquish authority to call-up reservists to an unelected official. *Id.* at 265.

[325] JOINT UNIVERSAL LESSONS LEARNED (JULLS) DATABASE, *Military Police Utilization in Support of Tactical Commanders,* JULLS No. 12524-44173, 23 December 1989, Unclassified, Version JM961, Washington D.C.: The Joint Staff/J7, 1 May 1996.

[326] *Id.*

Military Intelligence (MI) soldiers, untrained in this field, had to assume the MP soldiers' task of operating the detainee facility.[327]

The executive branch's refusal to tap into reserve MP assets and repeated activation of individual volunteer reservists instead of entire reserve units wreaks havoc with deploying MP units. Uniform detainee procedures, which even the newly arrived reservist could learn by reading the field manual, could help alleviate some of these training nightmares.

b. Judge Advocate Training--

These uniform procedures would improve training for another group of soldiers as well, judge advocates. Operational commanders have learned that today's legally charged atmosphere necessitates the presence of judge advocates during all deployments.[328] During the Vietnam War, the number of judge advocates in theater ranged from seven during the first few months of 1965, to 35 by the end of 1966.[329] By contrast, the number of judge advocates deployed to Southwest Asia in Desert Storm

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[327] JOINT UNIVERSAL LESSONS LEARNED (JULLS) DATABASE, *Lack of Support at Enemy Prisoner of War Sites,* JULLS No. 12453-13261, 20 December 1989, Unclassified, , Version JM961, Washington D.C.: The Joint Staff/J7, 1 May 1996.

[328] Protocol I requires that "[t]he High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers [sic] are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and the Protocol and on the appropriate instruction to be given to the armed forces on this subject." Protocol I, *supra* note 32, at art. 82.

[329] Vietnam, *supra* note 4, at 6-9, 57.

ranged from 46 in September 1990 to 270 by February 1991.[330] In Operation Uphold Democracy, a total of 54 judge advocates deployed to Haiti for some period between September 1994 and September 1995.[331]

Once deployed, judge advocates can no longer afford the luxury of specialization. They can no longer assume that there will always be another judge advocate around who can answer the question. They may be the only source of legal advice for miles. Whereas before they were "legal assistance attorneys" or "claims attorneys," deployed judge advocates must instantly become generalists, knowledgeable in almost every area of law.[332] Expecting these attorneys to give informed and well-reasoned legal advice under these circumstances is a tremendous burden. Uniform detainee procedures will aid the judge advocate's task by providing concrete advice on the subject.

Even experienced judge advocates and senior commanders can benefit from uniform detainee procedures. Lack of uniform procedures on detainee due process and last minute operational changes forced judge advocates in both Operation Restore Hope and

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[330] HAITI AAR, *supra* note 6, at 25, n.71.

[331] *Id.* at 25.

[332] *See* Warren, *supra* note 22, at 36:

> From running the "weapons for cash" turn-in program in Grenada to investigating war crimes in Kuwait, from trying court-martial in Saudi Arabia to advising detainee interrogators in Haiti, from participating in targeting cells in Somalia to sitting on joint military commissions in Bosnia, judge advocates constantly expand the scope of the practice of operational law.

Operation Uphold Democracy to develop procedures in theater.[333] As a consequence, the commands did not implement due process procedures until well after the operations began. For example, in Operation Restore Hope, UNITAF completed its comprehensive detainee due process guidelines in theater during the first two months of the operation.[334]

Judge advocates deployed in Operation Uphold Democracy would have undoubtedly benefited from uniform detainee procedures. The command did not develop attorney access, family visitation and due process procedures until approximately six days after establishing the detention facility because the operation had changed last minute from an invasion to a permissive entry.[335] This delay occurred even though the need for a U.S.-run detainee facility became apparent within 72 hours of the MNF's arrival in country[336] with the capture of several pro-Cedras attaches.[337] With uniform procedures, the command could have put family and attorney visitation and due process procedures into effect immediately.

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[333] *See supra* note 314.

[334] Lorenz, *supra* note 6, at 27, 35; CUTF Policy, *supra* note 21, at ¶1.

[335] Interview with Captain Kerry Erisman, Judge Advocate for the Joint Detention Facility during Operation Uphold Democracy (March 4, 1997) [hereinafter Interview with Captain Erisman].

[336] HAITI AAR, *supra* note 6, at 63.

[337] CENTER FOR ARMY LESSONS LEARNED, U.S. ARMY TRAINING AND DOCTRINE COMMAND, OPERATION UPHOLD DEMOCRACY, DECEMBER 1994 144 (Dec. 1994) [hereinafter Haiti Initial Impressions].

3. Uniform Procedures will Enhance Relations with Media and Human Rights Groups--

> *David Ijalaya, legal adviser to the UN special representative, Jonathan Howe, claimed yesterday that the UN was drawing its authority [to detain] from accepted legal codes as promoted by all "civilized countries." But asked whether the absence of lawyers was an acceptable practice in civilized countries, he said: "Osman Ato [faction leader Aide's financier] is being held for security reasons, and the authority is under chapter seven, no other legal code"* [338]

Mr. Ijalaya's statement, while technically correct, demonstrates how difficult it is to articulate a clear standard when no such standard exists. Suppose Mr. Ijalaya had responded like this:

> Under international law, access to attorneys during detention is a widely accepted right of detainees except when deviation from this right is necessary to quell national emergencies such as the one in Somalia at this time.[339] This deviation is permitted under Article 11 of the African Convention for Human Rights.[340] The UN's procedures for detainee treatment are found in the UN Peacekeeping Standard Operating Procedures. I invite you to take a look at them, and I will be happy to answer any more questions you might have

Uniform detainee procedures would deflect the media from jumping into the "legal vacuum" that currently surrounds this issue. If the U.S. forces fail analyze the complex web of international law on detainees' rights, how can U.S. military spokesmen

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[338] Huband, *supra* note 11, at 14.

[339] *See* discussion *infra* Part *IIC1.*

[340] African Charter, *supra* note 221, at art. 11.

satisfactorily explain these rights to reporters and human rights groups? Already, there are signs of confusion. For example, a newsletter, published to disseminate lessons learned from army operations, states that detainees in OOTW have a right to consult with an attorney.[341] However, no treaty, law or Army doctrinal publication mandates that civilian detainees in OOTW have a right to consult with a retained attorney. There is currently a lack of consensus as to whether international law requires that detainees have a right to access to attorneys.[342] The MNF permitted detainees access to retained attorneys in Operation Uphold Democracy;[343] however, this practice did not establish U.S. Army doctrine.[344]

While the media and human rights groups will always find something to exploit, uniform procedures will force the Army to articulate clear, attainable standards before addressing the concerns of reporters and human rights groups.

4. Uniform Procedures Promote Respect for the Rule of Law--

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[341] CENTER FOR ARMY LESSONS LEARNED (CALL), U.S. ARMY TRAINING AND DOCTRINE COMMAND (TRADOC), FORT LEAVENWORTH, KANSAS, *Peace Operations Training Vignettes with Possible Solutions,* NEWSLETTER NO. 95-2 (March 1995), at 17-1 and 17-2.

[342] *See* discussion *infra* Part II*B1b*.

[343] HAITI AAR, *supra* note 6, at 69-70.

[344] JA 422, *supra* note 179, at 18-8 n.7.

The rule of law "provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application."[345] "At the state level, promoting the rule of law means strengthening democratic ideals and institutions."[346] The U.S. dedicates a large part of its foreign relations to promoting the rule of law in developing countries throughout the world.[347]

Uniform detainee procedures would help promote the rule of law. The procedures would demonstrate how a government can base its decisions to detain and release on a previously established set of laws and procedures, as opposed to the political whims of whoever takes control. For many peoples living in lawless societies, the detention facility may be the first taste they have of a fair system of discipline.[348] Once they have this taste of life under the rule of law, pre-OOTW conditions often become intolerable.[349]

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[345] BLACK'S, *supra* at 31, at 1332.

[346] Newton, *supra* note 72, at 82.

[347] Section 502B of the Foreign Assistance Act of 1961 prohibits distribution of U.S. security assistance "to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights violations," to include "torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without trial, . . ." 22 U.S.C. § 2304(d)(A-C) (1994).

[348] "According to one Judge Advocate, '[t]he ICRC [International Committee of the Red Cross] credited this program [the Operation Uphold Democracy Joint Detention Facility] with giving the Haitians the first real lesson on fairness, real due process, and the right to be heard.'" HAITI AAR, *supra* note 6, at 70.

[349] Haitian prisoners at the Federal Penitentiary rioted on February 18, 1995, shortly after the MNF transferred detainee procedures back to the Government of Haiti. The Haitian Minister of Justice agreed with MNF officials that lack of due process procedures contributed significantly to the prisoners' unrest. Memorandum for Record, Major Mark P. Sposato, Deputy Staff Judge Advocate, 25th Infantry Division, subject: Disturbance at Haitian Federal Penitentiary, ¶¶ 9 and 10 (Feb. 19, 1995).

III. Proposed Procedures

The previous section described the risks of not developing uniform detainee procedures and the advantages of developing these procedures. This section proposes and defends procedures to fill the "legal vacuum" of treatment of civilians detained during OOTW.

There are no moral and few persuasive legal arguments why civilians detained during OOTW should receive treatment that falls below the standards set by the GPW. The GPW standard is higher than the detainee treatment standards found in customary international law. However, if the community of nations agreed, through ratification of the GPW, to provide these treatment standards for POWs, there is little reason those same countries cannot provide this treatment standard for detainees as well.

However, civilians detained during OOTW are primarily criminal suspects, not POWs. Under international and constitutional law, another whole new set of protections come into play as well for criminal suspects, such as due process protections. These protections find no analogy under the GPW. Furthermore, OOTW resembles post-war occupation more than international armed conflict.[350] For this reason, the Geneva

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[350] "Although the United States entered Haiti to begin Operation Uphold Democracy by executing a 'semi-permissive' entry, some have argued that the United States occupied a legal status closely akin to formal occupation. Special Advisor to the President on Haiti

Convention Relative to the Protection of Civilian Persons in Time of War (GC), which governs the conduct of occupiers, also provides a model for many aspects of detainee treatment and due process. Lastly, the Sale case warns the military to model its detainee procedures after the Constitution as well.

A. Treatment Standards

The GPW provides a good model for treatment procedures, especially given the minimal treatment standards offered by other sources of international law in this area. However, detainees are often violent criminals. POWs are usually not. For this reason, two UN instruments, the Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment (Body of Principles),[351] and the Standard Minimum Rules for the Treatment of Prisoners (Standard Rules),[352] also serve as models for these procedures.

The detainee procedures follow GPW treatment standards in the following areas: visitation by the International Committee of the Red Cross (ICRC); transfer to host

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Lawrence A. Pezzula recently stated "to this date, Aristide is not running the nation; the U.S. is in effective control of the nation. Not a single ministry in Haiti now operates. We are an army of occupation.'" Whitaker, *supra* note 20, at 26n.186.

[351] Body of Principles, *supra* note 135.

[352] U.N. Economic and Social Committee, 24th Sess., U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977) [hereinafter Standard Rules].

nation; interrogation standards; and quarters, food and clothing; and medical treatment. There are no moral, and few legal arguments why detainees should receive a lesser standard of treatment in these areas than those found in the GPW. The U.S. has given detainees POW treatment as a matter of policy since the Vietnam War.[353] Giving detainees EPW treatment in these areas makes good political sense as well. The U.S. may err in its analysis as to whether certain captured persons are POWs or detainees. For example, debate still ensues over whether persons captured during Operations Just Cause and Operation Urgent Fury were POWs or only detainees.[354] When the U.S. mistakes EPWs for detainees, it has violated no one's rights because it has already afforded this group the greatest protections possible under the GPW. Another political reason to treat detainees in accordance with the GPW is to induce the local population to afford U.S. soldiers the same treatment if captured.[355]

The areas where the detainee procedures differ from the standards set forth in the GPW include retention of detainees' property, detainee segregation, physical activities, detainee discipline and labor, and detainee pay. The potentially violent nature of these detainees distinguishes these areas from those previously mentioned. These differences

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[353] *See* Vietnam, *supra* note 4, at 66 and 129 (describing how detainee treatment standards, in particular with regards to interrogation, met GPW standards); Warren, *supra* note 22, at 58 (describing how detainees captured in Operation Just Cause in Panama, Restore Hope in Somalia, and Uphold Democracy in Haiti received POW treatment).

[354] *See supra* note 39 (debate over Operation Just Cause); Whitaker, *supra* note 20, at 34n.261 (debate over Operation Urgent Fury).

[355] For example, South Vietnam's rumored execution of Viet Cong captured during the Vietnam provoked the North Vietnamese to execute three U.S. soldiers in reprisal. *See* Vietnam, *supra* note 4, at 49.

reflect the fact that a detainee's status more closely resembles that of a pretrial criminal suspect than that of a POW.

1. Visitation by the International Committee of the Red Cross--

The GPW and Protocol I require that the detaining power permit a "protecting power," such as the International Committee of the Red Cross (ICRC), to conduct its humanitarian activities and inspect prisoner of war camps for adherence to GPW standards.[356] Common Article 3 and Protocol II require that an "impartial humanitarian body, such as the International Committee of the Red Cross," be permitted to "offer its services to the Parties to the conflict."[357] The GC also requires that "[r]epresentatives of the Protecting Powers shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work."[358]

Nations, like people, often need the threat of inspection by an outside authority to encourage compliance with a treaty. The inspection function that the ICRC serves during war needs to continue during OOTW. The Israeli government, which applies the GC as a

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[356] GPW, *supra* note 26, at arts. 8-11, 125, 126; Protocol I, *supra* note 32, at art. 5.

[357] *Id.* at art. 3; Protocol II, *supra* note 33, at art. 11.

[358] GC, *supra* note 29, at art. 143. This article also states that:

> They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter. Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. Their duration and frequency shall not be restricted.

matter of policy to its administered areas,[359] permits ICRC access to its detention facilities.[360] The Body of Principles and Standard Rules both support inspections of detention facilities by outside authorities.[361] The judge advocates during Operation Uphold Democracy made an effort to provide the ICRC representatives maximum opportunities to inspect the facilities and answer all their questions.[362]

2. *Transfer of Detainees back to the Host Nation--*

Because OOTW often contemplate restoration of a host nation's police and judicial functions,[363] the military should anticipate transfer of the detainees back into the custody of the host nation. This transfer boosts the confidence of the local population in its leadership.[364]

The GPW states that detaining powers should only transfer POW to another party to the GPW.[365] The detaining power must satisfy itself of the "willingness and ability of

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[359] Israel, *supra* note 255, at 21-22. The "administered territories" include the Gaza Strip, Judea and Samaria (the West Bank). *Id.*

[360] *Id.* at 124-6.

[361] Body of Principles, *supra* note 135, at princ. 29; Standard Rules, *supra* note 352, at Rule 55.

[362] HAITI AAR, *supra* note 6, at 70.

[363] *See supra* note 240.

[364] HAITI AAR, *supra* note 6, at 67.

[365] GPW, *supra* note 26, at art. 12.

such transferee Power to apply the Convention."[366] Applying this standard is often a problem in OOTW, where the host nation is often willing to accept detainees from the military, but its ability to adhere to Convention standards of treatment is often lacking. In Operation Restore Hope, the UNITAF regularly visited and brought medical assistance to the Somali prisons where it had transferred UNITAF detainees.[367] In Operation Uphold Democracy, the MNF accomplished this in transfer in phases. Possession of the physical structure, release authority and overall responsibility vested immediately in the Haitian government upon transfer.[368] The MNF continued to provide outer security, assist in record-keeping and interrogation, and supply food, water and medical care for several more weeks.[369]

The MNF and government of Haiti signed a Memorandum of Agreement effecting the transfer of detainees that required that Haiti treat the detainees in a "humane" fashion.[370] The "humane" standard of treatment appears to be an attempt to establish a "middle ground" between Convention standards and maltreatment. However, this "humane" standard lacks the specificity of Convention standards. If the host nation signed the GPW, agreeing to its treatment standards for POWs, this nation should find it

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[366] *Id.*

[367] Somalia Legal AAR, *supra* note 61, at ¶ F2.

[368] HAITI AAR, *supra* note 6, at 67.

[369] *Id.*

[370] *Id.* at 295.

hard to justify treating its detainees any less humanely. The military needs to insist upon host nation adherence to GPW standards before transferring detainees into its custody.[371]

3. Interrogation Standards--

The GPW requires that "[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."[372]

Adhering to GPW standards for interrogations is practical and humane. The international community has agreed that these standards provide the acceptable balance in wartime between the force's need for information and the individual's rights to humane treatment. The Body of Principles sets a similar standard for detainee interrogation.[373] There is no heightened information requirement in OOTW that requires changing this balance. Adhering to GPW interrogation standards in OOTW is practical as well. Expecting soldiers to be able to make the subtle distinctions between interrogation techniques for prisoners of war that meet GPW standards, and interrogation techniques that meet a lower standard for detainees, invites detainee abuse.

4. Retention of Personal Property--

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[371] *See* Appendix at ¶ 2-24.

[372] GPW, *supra* note 26, at art. 17.

[373] Body of Principles, *supra* note 135, at princ. 21.

In Operation Uphold Democracy, the military police completely inventoried each detainees' property, recorded the inventory, and then sealed the property in a plastic bag and locked it in the "property room."[374] The GPW requires that POWs retain their "articles of personal use" such as helmets, protection masks, clothing and feeding items.[375] It also permits the detaining power to retain detainees' money and "articles of value" upon the order of an officer and with specific inventory procedures.[376]

Detainee procedures need to depart from GPW standards on this issue.[377] Detainees more closely resemble criminal suspects, rather than prisoners of war.[378] The heightened security requirements of handling violent criminals require that military police be permitted to retain all of an OOTW detainee's personal effects. The Standard Rules recommending retention of all the prisoner's personal effects.[379] Furthermore, the GPW's provision stems from a concern for the POW's safety from the threat of bombs,

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[374] Interview with Captain Kerry Erisman, *supra* note 335.

[375] GPW, *supra* note 26, at art. 18.

[376] *Id.*

[377] *See* Appendix at ¶ 2-11.

[378] One of the first detainees captured during Operation Uphold Democracy has thrown a live grenade into a crowd of innocent civilians. Interview with Captain Kerry Erisman, *supra* note 335. Many of the detainees in Operation Restore Hope were suspected of killing American soldiers. Keith B. Richburg, *Some Detained Somalis Said to Have Killed American Soldier*, WASH. POST, Nov. 12, 1993, at A47.

[379] Standard Rules, *supra* note 352, at Rule 43.

gunfire and chemical attacks during war. These threats usually are not present during most OOTW.

5. Segregation of Detainees--

During Operation Restore Hope, UNITAF segregated detainees by clan.[380] During Operation Uphold Democracy, the military intelligence personnel segregated detainees by seriousness of alleged crime, by intelligence value, and by gender.[381] The GPW requires that POWs be segregated by "nationality, language and customs, provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent."[382] It also requires that female POWs receive "separate dormitories."[383]

This is another area of treatment where detainee procedures must depart from GPW standards. Detainee segregation depends upon the reason for detention and the local custom. Since customs vary from locality to locality, a bright-line rule (except for segregating females) is inappropriate. The procedure should permit the facility commander to exercise discretion over detainee segregation.[384]

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[380] Somalia Lessons Learned, *supra* note 311, at ¶ 29F

[381] Interview with Captain Kerry Erisman, *supra* note 335.

[382] GPW, *supra* note 26, at art. 22.

[383] *Id.* at art. 25.

[384] *See* Appendix at ¶ 2-12.

6. Quarters, Food and Clothing--

The GPW requires that POWs be "quartered under conditions as favourable as those for the forces of the Detaining Power."[385] In particular, it specifies that POW premises be entirely protected from dampness, adequately heated and lit, and protected from fire hazards.[386] It specifies that the food rations should be "sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account should also be taken of the habitual diet of the prisoners."[387] It specifies that POWs be supplied sufficient drinking water, and that tobacco use be permitted.[388] It also specifies that the detaining power supply "[c]lothing, underwear and footwear" to POWs in sufficient quantities.[389] Camps should install canteens where POWs may procure food, tobacco and toiletry articles.[390]

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[385] GPW, *supra* note 26, at art. 25.

[386] *Id.*

[387] *Id.* at art. 26.

[388] *Id.*

[389] *Id.* at art. 27.

[390] *Id.* at art. 28. During Operation Uphold Democracy, an MP non-commissioned officer developed an innovative method of supplying detainees with these items. Each detainee received a personal hygiene kit upon arrival at the Joint Detention Facility. Twice a day, the MP soldiers gave the detainees their kits, each kit labeled with the detainee's identification number on their identification bracelet, also supplied them during inprocessing. The detainees could conduct personal hygiene for one hour, then the MP soldiers collected the kits and inventoried their contents. Haiti Initial Impressions, *supra* note 337, at 145-6.

Detainees in OOTW should merit the same level of treatment in these areas as POWs. The GC (for those detained during occupation) and the Standard Rules also call for these provisions.[391]

7. Medical Treatment--

The GPW requires that all camps take the sanitary measures necessary to ensure cleanliness and prevent epidemics [392] and have an adequate infirmary.[393] Detaining powers should provide specialized medical treatment to POWs whose condition necessitates it, even if that means admission to a civilian hospital.[394] A POW must be able to present him or herself for examination to medical authorities.[395] The detaining power must bear the costs of all medical treatment.[396] Facility doctors should inspect the POWs monthly.[397]

Uniform detainee procedures should incorporate these provisions as well. The GC requires these medical standards for those detained during an occupation, as do the

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[391] GC, *supra* note 29, at art. 76; Standard Rules, *supra* note 352, at Rules 10, 11, 17 and 20.

[392] GPW, *supra* note 26, at art. 29.

[393] *Id.* at art. 30.

[394] *Id.*

[395] *Id.*

[396] *Id.*

[397] *Id.* at art. 31.

Standard Rules and the Body of Principles.[398] This standard exceeds the Constitutional standards for unconvicted detainees outlined in Sale.[399] The prevalence of diseases like AIDS makes adherence to this standard more and more difficult,[400] but any lesser standard would be inhumane and difficult to quantify.

8. Religious, Intellectual and Physical Activities--

The GPW requires that POWs "enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by military authorities."[401] The GC states that those detained during an occupation "have the right to receive any spiritual assistance that they require,"[402] and the Standard Rules have similar requirements as well.[403]

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[398] GC, *supra* note 29, at art. 76; Standard Rules, *supra* note 352, at Rules 22-26 (these Rules also require that a "psychiatric service" be available to prisoners); Body of Principles, *supra* note 135, at princs. 24 and 25.

[399] Constitutional due process forbids governmental conduct that is deliberately indifferent to the medical needs of a non-convicted detainee. Haitians Center Council, Inc. v. Sale, 823 F.Supp. at 1044.

[400] During Operation Uphold Democracy, field sterilization techniques did not guarantee that medical equipment would be rid of the HIV virus. This was a problem given the high percentage of Haitians infected with HIV. The medical unit set aside a bed for treatment of Haitians only, although this fix threatened to transfer the virus to other Haitians. HAITI AAR, *supra* note 6, at 66.

[401] GPW, *supra* note 26, at art. 34.

[402] GC, *supra* note 29, at art. 76.

[403] Standard Rules, *supra* note 352, at Rules 41 and 42.

Accommodating detainees' religious requirements becomes more difficult as the military finds itself in regions whose primary religions have sparse support in the U.S. This difficulty does not justify formulating a lesser standard.

Likewise, the GPW requires that "the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games among prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment."[404] The GC does not provide for the pursuit of these activities. The Body of Principles requires that detainees have access to "reasonable quantities of educational, cultural and informational material, . . ."[405] The Standard Rules requires that each prisoner receive an hour of outdoor exercise daily and access to an "adequately" stocked library.[406]

During Operation Uphold Democracy, detainees had a daily opportunity to engage in physical exercise.[407] Access to a library is impractical during most OOTW. However, detainee access to a couple of publications in their language, that meet requirements of

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[404] GPW, *supra* note 26, at art. 38.

[405] Body of Principles, *supra* note 135, at princ. 28.

[406] "[E]very prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits, . . .every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, . . . " Standard Rules, *supra* note 352, at Rules and 21 and 40.

[407] Interview with Captain Kerry Erisman, *supra* note 335.

order and discipline within the facility, is not. The GPW's mandate that "sports and games among the prisoners" be encouraged is unacceptable among the violent criminal suspects detained by the military in OOTW.[408]

9. Detention Facility Discipline--

The GPW permits the detaining power to take judicial and disciplinary measures when POWs violate internal camp regulations, expressing a preference for disciplinary measures.[409] If the detaining power chooses disciplinary sanctions, the camp commander must give the prisoner access to all the information regarding the offenses of which he is accused, and an opportunity to defend himself, to include calling witnesses.[410] The camp commander, a commissioned officer, or an officer delegated by the camp commander, must conduct the hearing.[411] The punishment may consist 30 day durations of 1) forfeiture of one half of the advances of pay which the POW would otherwise receive; 2) discontinuance of privileges that exceed those granted by the GPW; 3) performance of "[f]atigue duties not exceeding two hours daily" (not to be applied to officers); and 4) confinement.[412]

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[408] *See* Appendix at ¶ 2-14.

[409] GPW, *supra* note 26, at arts. 82-108.

[410] *Id.* at art. 87.

[411] *Id.* at art. 96.

[412] *Id.* at arts. 89 and 90.

The Body of Principles and Standard Rules advocate discipline policies similar to the GPW.[413] However, the Sale decision exceeds the GPW standard for camp disciplinary due process. It holds that detainees are entitled to constitutional due process regarding punishment for violations of internal camp disciplinary rules, even when the camp is located outside of the territorial U.S.[414] The judge found that due process in this instance required "written notice of the allegations, a hearing, a written decision, an opportunity to call witnesses and present evidence, access to counsel, and an impartial decisionmaker."[415]

Sale exceeds GPW rules for disciplinary due process in that it requires written notice and access to counsel. The cases on prison disciplinary proceedings cited by Sale support the written notice requirement, but not the requirement for access to counsel.[416] When Sale conflicts with constitutional standards, the military should develop its procedures in accordance with the latter. The uniform detainee procedures should

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[413] Body of Principles, *supra* note 135, at princ. 30 (also includes detainees' right to appeal disciplinary decision); Standard Rules, *supra* note 352, at Rules 27-32 (includes a prohibition on employing any prisoner in a disciplinary capacity; prohibition on double jeopardy; prohibition of corporal punishment, placing in a dark cell and all "cruel, inhuman or degrading treatments." Close confinement or reduction in diet is permitted if a medical officer certifies that the prisoner can sustain it.).

[414] Sale, 823 F.Supp. at 1044.

[415] *Id.*

[416] Wolff v. McDonnell, 418 U.S. 539 at 564-571, 94 S.Ct. 2963, 2978-2982, 41 L.Ed.2d 935 (1974); McCann v. Coughlin, 698 F.2d 112, 119 121-22 (2d Cir. 1983).

augment the GPW due process requirements for camp disciplinary proceedings by adding a requirement for written notice, but not for access to counsel.[417]

10. Detainee Labor--

The GPW states that "the Detaining Power may utilize the labour of prisoners of war who are physically fit, . . ."[418] It further details who may be compelled to work,[419] what kind of work may be performed,[420] the working conditions,[421] the duration of the work day and week,[422] the amount of pay for the work,[423] and the organization of labor detachments.[424]

The GC says nothing about labor of detainees during occupation, although it does say that occupiers may compel occupants over age 18 to work for specified, non-military purposes.[425] The Body of Principles and Standards of Principles are silent on this as well.

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[417] *See* Appendix at ¶ 2-18*d*.

[418] GPW, *supra* note 26, at art. 49.

[419] Noncommissioned officers may only be required to do supervisory work, and officers and "persons of equivalent status" may not be compelled to work at all. *Id.*

[420] *Id.* at arts. 50 and 52.

[421] *Id.* at art. 51.

[422] *Id.* at art. 53.

[423] *Id.* at art. 54.

[424] *Id.* at art. 56.

[425] GC, *supra* note 29, at art. 51.

The CINC should have the discretion to determine whether the force may use detainees for labor in OOTW. The CINC should consider security issues stemming from the violent nature of the detainees' suspected crimes in making this decision.[426]

11. Detainee Pay--

Unlike POWs,[427] the military should not pay detainees a monthly allowance. Neither the GC, Body of Principles, Standard Rules nor the U.S. Constitution requires that detainees receive payment.[428]

B. Due Process Protections

The truly unique portions of these procedures are the due process provisions. Governments deprive POWs of their liberty because of their status as enemy soldiers: the grounds to detain persist as long as the war continues. Therefore, no need exists in the GPW for due process procedures to determine whether to continue detention. On the other hand, the military deprives detainees in OOTW of their liberty because of something they have done to threaten force security or because of their intelligence

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[426] *See* Appendix at ¶ 3-3.

[427] GPW, *supra* note 26, at arts. 58-68.

[428] *See* Appendix at ¶ 3-1.

value.[429] International and constitutional law holds that these civilians have a right to due process.

The heart of these due process provisions is that the OOTW CINC should decide whether a detainee's circumstances merit continued detention within 48 hours. Other due process provisions include limiting the grounds for detention to those previously approved by the OOTW CINC; providing reasonable access to legal counsel and family; and allowing detainees to petition for habeus corpus.

Long-term detention is a political decision. Common law principles of self defense and defense of the force authorize detention. The Rules of Engagement for an operation often reflect these common law principles.[430] However, long term detention of civilians can change the nature of an OOTW. This detention affects host nation and international perceptions of the legitimacy of U.S. action. When the U.S. military decides to detain civilians for extended periods of time, it is in effect making a statement that it does not trust the host nation's police force. This is a highly political statement. In Operations

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[429] HAITI AAR, *supra* note 6, at 68-69.

[430] *See* SECRET, Chairman of the Joint Chiefs of Staff, Instruction 3121.01, Standing Rules of Engagement for US Forces (1 Oct 1994):

> THESE RULES DO NOT LIMIT A COMMANDER'S INHERENT AUTHORITY AND OBLIGATION TO USE ALL NECESSARY MEANS AVAILABLE AND TO TAKE ALL APPROPRIATE ACTION IN SELF-DEFENSE OF THE COMMANDER'S UNIT AND OTHER US FORCES IN THE VICINITY.

Id. at Annex A, UNCLASSIFIED.

Restore Hope and Uphold Democracy, the Joint Chiefs of Staff permitted the military to detain civilians for long durations.[431] In 1995, the parties to the General Framework Agreement for Peace in Bosnia and Herzegovina[432] decided that the Implementation Force (IFOR) would hand over any civilian it detains to the local police. If a member of IFOR detains a civilian any longer than necessary in this operation, he or she would violate an international agreement. During Operation Restore Hope, warlord Mohammed Aidid cited the UN's long-term civilian detentions as one reason for his refusal to participate in talks with UN and American military officials.[433] For these reasons, the politicians decide when long term detention becomes necessary. Once the politicians decide that long-term detention of civilians is appropriate, the military needs to consider detainee due process procedures.

1. The Commander in Chief of the OOTW should decide on continued detention within 48 hours --

The first task is to analyze why the CINC should decide whether a detainee's circumstances merit continued detention. The second task is to analyze why the CINC needs to make this decision within 48 hours.

a. Why the Commander in Chief of the OOTW ? --

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[431] JA 422, *supra* note 179, at 18-9.

[432] 35 I.L.M. 75 (1996).

[433] Atkinson, *supra* note 3, at A20; Richburg, *supra* note 378, at A47.

In Operation Restore Hope, the unit commander, often a captain, made the first decision within 24 hours of arrest on a detainee's continued detention.[434] In Operation Uphold Democracy, the MNF Commander, a major general, made the first and only decision regarding a detainee's continued detention within a couple of days after the arrest.[435] As a consequence, although a "detainee judge advocate" interviewed the detainee within 72 hours of arrest, it often took the MNF commander up to ten days to decide whether continued detention was appropriate.[436]

The OOTW CINC should decide whether an individual detainee's circumstances warrant continued detention. Vesting release authority at this level continues the commander's role in American military jurisprudence.[437] It also emphasizes the sensitive political nature of the civilian detention process. Unlike in the military system, however, the commander should be able to delegate this authority. This delegation authority is especially vital if the commander anticipates lacking the time to make a decision on continued detention before the 48 hour deadline. Permitting this delegation to staff principles or the staff judge advocate ensures that the decision-maker has access to the legal, force protection, and intelligence information necessary to make an informed decision on detainee release.

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[434] CUTF Policy, *supra* note 21, at ¶ 4A. The UNITAF commander had to authorize all detentions of over 24 hours. *Id.* at ¶ 4C.

[435] HAITI AAR, *supra* note 6, at 71. The MNF retained this authority due to the sensitivity of inadvertently releasing a murderer or a potential assassin.

[436] Warren, *supra* note 22, at 60.

[437] *See* MCM, *supra* note 240, at R.C.M. 401-406.

b. Why within 48 hours ? --

A 48 hour deadline to decide whether to continue detention has support from state practice and from constitutional case law. Using a bright-line rule is also legal, promotes efficiency and helps promulgate the rule of law.

A bright-line 48 hour rule incorporates state practice. Twenty-one countries require a judge or magistrate to decide on the continued detention of a criminal suspect within 48 hours.[438] It also incorporates constitutional law. Sale held that arbitrary detention, practiced by U.S. officials, outside the territorial U.S., in an area under the exclusive U.S. jurisdiction and control, is subject to constitutional limits.[439] The Supreme Court has determined that a bright-line 48 hour rule satisfies constitutional requirements.[440]

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[438] These nations include Algeria, DA PAM 550-44, *supra* note 232, at 200, 281; Angola, hereinafter DA PAM 550-59, *supra* note 233, at 251; Austria, DA PAM 550-176, *supra* note 233, at 253; Belize, DA PAM 550-82, *supra* note 233, at 307; Cote d'Ivoire, DA PAM 550-69, *supra* note 232, at 145, 210; Dominican Republic, DA PAM 550-36, *supra* note 238, at 189; Egypt, DA PAM 550-43, *supra* note 233, at 343; Germany, DA PAM 550-173, *supra* note 232, at 347-8, 511-2; Haiti, HAITI CONST., arts. 24 and 26 (1987); Japan, DA PAM 550-30, *supra* note 238, at 456, 471-2; Jordan, DA PAM 550-34, *supra* note 237, at 274-6; Madagascar, DA PAM 550-154, *supra* note 238, at 307; Mexico, James E. Herget and Jorge Camil, *The Legal System of Mexico,* CYCLOPEDIA, *supra* note 233, at 1.30.23, § 1.2(H); Paraguay, DA PAM 550-151, *supra* note 232, at 241-2; Portugal, DA PAM 550-70, *supra* note 238, at 268-270; Seyshelles, DA PAM 550-46, *supra* this note, at 244, 321; South Korea, DA PAM 550-41, *supra* note 232, at 324-327; Sudan, DA PAM 550-27, *supra* note 232, at 211-217; United Arab Emirates, DA PAM 550-185, *supra* note 238, at 367; Uruguay, DA PAM 550-97, *supra* note 238, at 230; and Zaire, DA PAM 550-67, *supra* note 232, at 323.

[439] Sale, 823 F.Supp. at 1049.

[440] County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991).

Many commentators advocate using host nation law as a guide for detainee due process procedures in OOTW. They point to the success of the Joint Detention Facility in Operation Joint Democracy. In this operation, some of the JTF attorneys stated that they based the due process system they developed on host nation law.[441] They consulted the Haitian Constitution to determine the time limit within which the judge needed to complete the legal review of the detainee's detention.[442] This time period, 48 hours, served as a guide for their own system.[443] The result was a workable system, lauded by the International Committee of the Red Cross.[444]

These advocates can also point to the GC, which states that "the penal laws of the occupied territory shall remain in force, . . ."[445] While the U.S. is not an occupier in OOTW, its actions during OOTW often resemble those of an occupier and therefore, application of the GC by analogy is often appropriate.[446] Also, the military may try to cull local population consent to the detention facility operations by basing detainee due process procedures on host nation law. For example, in OOTW the U.S. needs to

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[441] HAITI AAR, *supra* note 6, at 68 n225.

[442] *Id.*

[443] *Id.*

[444] *Id.* at 64.

[445] GC, *supra* note 29, at art. 64.

[446] Whitaker, *supra* note 20, at 26n.186.

convince the local population that it is detaining civilians properly for the right reasons.[447] If the U.S. cannot convince the local population that U.S. forces are there to help them, or that the supported government truly deserves to be in power, or that the warlords are destroying their way of life, then all the military might in the world may fail in OOTW.[448] Deference to host nation law, especially their due process procedures, is one way to convince the local population of American sincerity.

However, using host nation law as a due process guide for every OOTW detainee operation may sabotage the host nation consent that the force seeks to cultivate. Many nations lack due process provisions in their constitutions or criminal procedural codes, or have provisions that are so lacking in due process that the U.S. would never want to borrow them.[449]

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[447] *See* Draft FM 100-20, *supra* note 159, at 1-12, 1-13.

[448] *See* FM 100-23, *supra* note 5, at 13.

[449] China, Bruce J. McKee, *The Legal System in the Peoples Republic of China in General, in* CYCLOPEDIA, *supra* note 233, at 9.300.37 § 1.7(C)(2) (Criminal suspect must be brought before magistrate within seven days); Equador, DA PAM 550-52, *supra* note 233, at 245 (15 days for local police to turn criminal suspect over to prosecutor); Guyana, DEP'T OF ARMY, PAM 550-82, AREA HANDBOOK SERIES, GUYANA, 145 (1993) [hereinafter DA PAM 550-82] (No due process procedures for criminal suspects in detention); Laos; Kenneth L. Cochran, *The Legal System of Laos, in* CYCLOPEDIA, *supra* note 233, at 320.25, § 1.2B(4)(c)(v) (Criminal suspects must be brought before the magistrate within three months); Mongolia, Timothy E. Keehan, *The Legal System of Mongolia, in* CYCLOPEDIA, *supra* note 233, at 330.17, § 1.5(A) (No due process procedures in place for legal review of pretrial detention); Mozambique, Timothy E. Keehan, *The Legal System of Mozambique, in* CYCLOPEDIA, *supra* note 233, at 240.20, § 1.4(D)(1); North Korea, DEP'T OF ARMY, PAM 550-81, AREA HANDBOOK SERIES, NORTH KOREA, 271-2 (1994) [hereinafter DA PAM 550-81] (same); Philippines, Myrna S. Feliciano, *The Legal System of the Philippines, in* CYCLOPEDIA, *supra* note 233, at 330.17, § 1.5(A) (same); Saudi Arabia, DEP'T OF ARMY, PAM 550-51, AREA HANDBOOK SERIES, SAUDI ARABIA, 282-3 (1993) [hereinafter DA PAM 550-51] (24 hours for

A 48-hour bright-line rule also promotes efficient military operation. Adapting every OOTW to host nation law would involve "reinventing the wheel" for detainee facilities in every future operation. This is impractical where the detainee due process rights of a majority of countries vary little from state to state. While at least 21 countries have a 48 hour time limit before which a judge or magistrate must rule on continued detention, at least 18 countries have a 24 hour time limit for this,[450] and at least 6 countries have a 72 hour time limit.[451] These time limits lend themselves to formulating a bright-line rule. The 24 hour discrepancy does not significantly affect the detainee's due process rights. For example, while the MNF in Operation Uphold Democracy claimed to have used Haitian law as a guide for developing its due process procedures, the resulting standard di not coincide with host nation law. The Haitian standard was 48 hours. The MNF used a

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religious police to turn criminal suspect over to regular police: no other due process provisions); Taiwan, CYCLOPEDIA, *supra* note 233, at 2A.40.41, § 1.8(A) (Detainee must be brought before magistrate within seven days).

[450] These nations include Bangladesh, DA PAM 550-175, *supra* note 238, at 153, 243; Burma, DA PAM 550-61, *supra* note 238 at 261; Bolivia, DA PAM 550-66, *supra* note 238, at 268; Cypress, DA PAM 550-22, *supra* note 238, at 240-2; Greece, DA PAM 550-87, *supra* note 233, at 320; India, DA PAM 550-21, *supra* note 232, at 617; Indonesia, DA PAM 550-39, *supra* note 237 at 340-1; Jamaica, DA PAM 550-33, *supra* note 245, at 158; Malaysia, DA PAM 550-45, *supra* note 232, at 189; Nepal and Bhutan, DA PAM 550-35, *supra* note 232, at 153-4; Oman, DA PAM 550-185, *supra* note 238 at 374; Panama, DA PAM 550-46, *supra* note 238 at 251-2; Peru, DA PAM 550-42, *supra* note 232, at 212, 314; Somalia, DA PAM 550-86, *supra* note 232, at 219-220; Sri Lanka, DA PAM 550-96, *supra* note 238 at 257-261; Turkey, DA PAM 550-80, *supra* note 233, at 367-8; Western Samoa, CYCLOPEDIA, *supra* note 233, 2A.100.12, § 1.2(A); Yugoslavia, DA PAM 550-67, *supra* note 237, at 278.

[451] These nations include Belize, DA PAM 550-82, *supra* note 233, at 307; El Salvador, DA PAM 550-150, *supra* note 238, at 151-5; Finland, DA PAM 550-167, *supra* note 233, at 341; Lithuania, DA PAM 550-113, *supra* note 233, at 240; Nicaragua, DA PAM 550-88, *supra* note 233, at 221-3; Spain, DA PAM 550-179, *supra* note 237, at 331-2.

72 hour review period instead.[452] However, once this system was in place, there were no reports of complaints from media or the local population over the 24 hour discrepancy between the MNF standard and the Haitian constitution. Any due process standard imported by the Americans was a welcome change from the prior anarchy experienced by the population.

An argument exists that, even under the rule of law, the military owes detainees no due process rights at all during OOTWs. This argument stems from the "public emergency" exception found in many human rights treaties and practiced by many states.[453] States undergoing a "public emergency" may deviate from due process procedures, but only to the extent necessary to enable the nation to recover.[454] An OOTW usually occurs in a country that is undergoing a "public emergency which threatens the life of the nation, . . . "[455] Like countries, military units undergo an "emergency" as well upon deployment on an OOTW mission. The tremendous pressure

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[452] Major Becker contradicts the Center for Law and Military Operation's assertion that the 72 hour prolonged detention standard was fashioned after host nation law. "It was based solely on the time the interrogators needed before we could release detainees. It had nothing to do with host nation law." Interview with Major Becker, *supra* note 81.

[453] *See supra* notes 251 through 258 and accompanying text.

[454] *Id.*

[455] International Covenant, *supra* note 20, at art. 4.

placed upon the military to relocate and perform their missions under austere conditions creates this public emergency.[456]

To accommodate these emergency conditions, the uniform procedures permit the CINC to delay the decision on the propriety of continued detention until ten days after the detainee's capture, "for good cause."[457] CINCs need to keep in mind that this "good cause" may be subject to scrutiny by federal courts upon writ of habeus corpus. They also need to keep in mind that the international community has criticized several nations for excessively deviating from their due process procedures during public emergencies. These nations include the United Kingdom,[458] Israel,[459] South Africa,[460] and Russia.[461]

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[456] During Operation Restore Hope, 986 military airlifts moved over 33,000 passengers and more than 32,000 short tons of cargo to Somalia. Eleven ships . . . moved 365,000 "measurement" tons of cargo to the theater as well as 1,192 containers of sustainment supplies. And over 14 million gallons of fuel were delivered from Ready Reserve Force tankers to the forces ashore." KENNETH ALLARD, SOMALIA OPERATIONS: LESSONS LEARNED 45 (1995).

[457] Because the case law on due process during public emergencies is so inconsistent, the ten day time period is based on similar pretrial detention rules in the military. MCM, *supra* note 240, at R.C.M. 305(I)(4). *See also* Appendix at ¶ 1-7.

[458] The International Body on Arms Decommissioning, chaired by former U.S. Senator George Mitchell, issued a report in January 1996 that stressed the need for the U.K. to put an end to its emergency legislation that deals with terrorist violence in Northern Ireland. The report argues that the U.K.'s lack of attention to human rights, as demonstrated by its emergency laws that permit compromised standards for arrest, detention, interrogation, and the right to counsel, has contributed to the failure of the peace talks between the U.K. and several paramilitary organizations. HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH REPORT 1997, 247-8 (December 1996).

[459] *Id.* at 291-3.

[460] Donald Woods, *Requiem for a Heavyweight,* NEWSWEEK, February 10, 1997, at 43 (Describing how the 1977 arbitrary detention, torture and death of Steve Biko, a leading

2. A hearing must be conducted within 48 hours of arrest--

In Operation Restore Hope, the command did not require the local commander to conduct a hearing with the detainee as part of the initial review of detention.[462] As a result, many detainees complained that they did not know why they were being detained or what their rights were.[463] They complained that no one cared to hear their side of the story.[464] On the other hand, in Operation Uphold Democracy, the command required that a "detention judge advocate" interview all detainees within 72 hours of arrest.[465] Seeing these interviews culminate in several releases calmed the detainees.[466] The ICRC remarked that this provision of minimal due process allowed detainees to "let off steam."[467]

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antiapartheid activist, at the hands of South African security policemen, helped "inflame world opinion against apartheid.").

[461] HUMAN RIGHTS WATCH HELSINKI, RUSSIA, THREE MONTHS OF WAR IN CHECHNYA, 12-16 (describing mistreatment and abuse of Chechnyan detainees by Russian forces).

[462] CUTF Policy, *supra* note 21.

[463] *See* Huband, *supra* note 11, at 14; Warren, *supra* note 22, at 59.

[464] *Id.*

[465] HAITI AAR, *supra* note 6, at 68.

[466] *Id.*

[467] *Id.*

A detainee's right to a hearing held promptly after arrest by a judge or other authority to determine the need for continued detention is well-established in international law.[468] During this hearing, detainees should be informed of the grounds for detention and of their rights as detainees. The detainee's right to this information receives substantial support from sources of international law.[469]

Allowing the detainee to state why continued detention is unwarranted during this hearing has a degree of support in international law.[470] More importantly, it appears to have an enormous positive psychological affect upon the detainee population. For example, a prison riot occurred at the Haitian Federal Penitentiary in February of 1995.[471] This riot occurred after the Haitian judge had stopped conducting legal reviews of the grounds for detention for approximately 40 days, and the prison population had jumped from 350 to over 600.[472] The Haitian Minister of Justice agreed with the MNF that the lack of due process procedures had contributed substantially to the prisoners' unrest.[473]

The CINC or designated representative probably would not have the time to conduct these hearings. However, this decisionmaker should use information from this hearing to

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[468] *See* discussion *infra* Part II*B2b*.

[469] *See supra* notes 237 and 243.

[470] *See supra* note 244.

[471] Memorandum for record, Major Mark P. Sposato, subject: Disturbance at Haitian Federal Penitentiary (19 February 1995).

[472] *Id.*

decide whether the detainee's circumstances warrant continued detention. It is appropriate to require that a judge advocate, who knows how to "ask the right questions," conduct these hearings and relay the responses in writing to the CINC or his or her representative. Having a judge advocate fill this role also fulfills the requirement in international law that the hearing be conducted by a "judge or other authority."[474] [475]

3. The CINC should clearly enunciate the grounds for detention--

In both Operation Restore Hope and Operation Uphold Democracy, the commands failed to clearly enunciate all the grounds for detention before long-term detention began.[476] For example, in Operation Uphold Democracy, three of the four grounds for detention were derived from the rules of engagement.[477] The fourth ground for detention, "the individual has valuable information pertaining to individuals not yet detained to whom one or more of grounds 1 through 3 apply," remained unpublished.[478]

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[473] *Id.*

[474] *See supra* note 238.

[475] *See* Appendix at ¶ 1-7.

[476] Lorenz, *supra* note 6, at 34 (stating that, although detentions began on day one of the operation, uniform standards for continued detention were adopted until several weeks into the operation); HAITI AAR, *supra* note 6, at 69; Reardon notes, *supra* note 81, at 13 ("The JTF established release criteria only after the establishment of [the] Joint Detention Facility.").

[477] HAITI AAR, *supra* note 6, at 69.

[478] *Id.*; Reardon notes, *supra* note 81 (Captain Peter Becker, the judge advocate for the MI Brigade during Operation Uphold Democracy, points out that it was not made clear whether the list of serious offenses for which one could be detained was exhaustive, and suggests that detention and release criteria should be published as an annex to the original Operations Order or in the Rules for Engagement).

Customary international law prohibits prosecution by *ex post facto* laws.[479] Several countries' laws and constitutions prohibit this as well.[480] The GC forbids retroactive enforcement of penal provisions by the occupying power.[481] The U.S. should strive to avoid the appearance that it invents reasons to detain at whim. To this effect, the CINC should clearly enunciate grounds for detention in the rules of engagement, operations order, or by some other means of written communication.[482]

4. The CINC should review the grounds for continued detention every 30 days--

The Body of Principles and the GC mandate periodical reviews of the grounds for detention.[483] This review is especially important to prevent civilians from languishing in detention during a prolonged OOTW, where the military lacks jurisdiction to try them. In Operation Uphold Democracy, the MNF Commander reviewed the list of detainees on a daily basis.[484] A daily review is ideal. A review every thirty days is the minimally acceptable standard.

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[479] *See supra* note 242.

[480] *Id.*

[481] GC, *supra* note 29, at art. 65.

[482] *See* Appendix at ¶ 1-7.

[483] Body of Principles, *supra* note 135, at princ. 39; GC, *supra* note 29, at art. 78 (recommends a review of detainees' cases in occupied territory every six months).

[484] *See* HAITI AAR, *supra* note 6, at 71.

5. Detainees should have reasonable access to a retained attorney and to family visits --

In Operation Restore Hope, detainees received no visits of any kind. The press took note.[485] In Operation Uphold Democracy, detainees received visits from both retained attorneys and family members, subject to reasonable restrictions.[486]

International law provides some support for a detainee's right to family visits. The GC requires that the detaining power permit detainees in occupied territories to have "visitors, especially near relatives."[487] The Israeli government permits detainees in its "administered territories" to have a half-hour family visit every two weeks.[488] Case law from the European Court of Human Rights supports family communication rights for detainees even during a state of emergency.[489] The military should permit reasonable family visitation, subject to security and mission concerns.[490]

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[485] *See supra* notes 13 and 14 and accompanying text.

[486] For example, the command permitted three visits a week from family or attorneys, but no conjugal visits from spouses. Reardon notes, *supra* note 81; HAITI AAR, *supra* note 6, at 69-70. These visits took place on Mondays, Wednesdays and Fridays from 1200 to 1500 hours, with a maximum visit lasting 15 minutes. Interview with Captain Erisman, *supra* note 335.

[487] GC, *supra* note 29, at art. 116.

[488] Israel, *supra* note 255, at 127-128.

[489] McVeigh, O'Neill and Evans v. UK, 5 Eur. Ct. H.R. at 71 (1981) (Prohibiting detainee from communicating with family during 45 hour detention violates European Convention, even under emergency conditions).

[490] *See* Appendix at ¶ 2-14.

During Operation Uphold Democracy, the MNF permitted detainees to receive visits from their retained attorneys.[491] International law provides some support for a detainee's access to a retained attorney during detention.[492] All the GC requires is that detainees during occupation have access to an attorney for the drafting of legal documents only.[493] The Israeli government[494] and the United Kingdom[495] permit their detainees, even under emergency laws, reasonable access to retained attorneys. The military should do likewise, with the caveat that security concerns may override this access.[496]

6. Habeus Corpus Review --

Civilians detained during OOTW might already have a right to a habeus corpus review of the legality of their detention. The Court of the Southern District of Florida, in U.S. v. Noriega, found that prisoners of war under U.S. custody may petition the federal courts for *habeus corpus.*[497] This access enables POWs to enforce their GPW rights

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[491] *See* HAITI AAR, *supra* note 6, at 70.

[492] *See supra* note 245.

[493] GC, *supra* note 29, at art. 113.

[494] *See* Israel, *supra* note 255, at 128.

[495] Brannigan and McBride v. UK, 17 Eur.Ct.H.R. (ser. B) at 539 (1994).

[496] *See* Appendix at ¶ 1-7.

[497] U.S. v. Noriega, 808 F.Supp. 791, 799 (S.D. Fla. 1992).

through appeal to a court of law.[498] Detainees in OOTW lack protection from a powerful treaty like the GPW. But, like POWs, they nevertheless have rights under international law that can only be enforced through access to a court of law.

However, if detainees in OOTW do not possess this right, they should. Habeus corpus is the mechanism essential to guarantee the protection of all the detainee's other rights and protections under international and domestic law. Almost all human rights related treaties and UN instruments provide detainees with a right to habeus corpus.[499] At least 21 countries provide this right to criminal convicts or suspects in their laws or constitution.[500] However, most of these treaties, instruments, laws and constitutions permit deviating from or eliminating habeus corpus during public emergencies.[501] This list includes the U.S. Constitution.[502] In the face of this growing state practice, the Inter-American Court of Human Rights and the European Court of Human Rights have both decided that nations may not legally suspend a detainee's right to petition for *habeus*

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[498] The court recognized that POWs had an ability to complain to the detaining power under procedures established by the GPW. However, the fact that the detaining power had the sole discretion over its response to these complaints rendered the procedure useless in the eyes of the court. *Id.*

[499] *See supra* note 249.

[500] *Id.*

[501] *See supra* note 253.

[502] U.S. CONST. art. I, § 9(2) ("The privilege of the Writ of Habeus Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

corpus during states of emergency.[503] These courts reasoned that the ability to appeal the legality of one's detention to a court of law protects other *jus cogens*[504] detainee rights, rights from which no nation may deviate, even during public emergencies. Because *habeus corpus* protects *jus cogens* rights, the right to *habeus corpus* should become *jus cogens* itself.[505]

The GC mandates that rights granted to civilians detained during an occupation "shall include the right of appeal for the parties concerned."[506] The Israeli laws for the "administered territories" permit detainees to file for habeus corpus.[507] Other state practices indicate a trend toward prohibiting suspension of habeus corpus during public emergencies.[508]

Permitting detainees to petition U.S. district courts for habeus corpus would provide a check on the military's exercise of power over civilians detained during OOTW.

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[503] Inter-American Court of Human Rights, Advisory Opinions OC-8/87 and 9/87 (6 October 1987); Habeus Corpus in Emergency Situations (Advisory Opinion OC-8/87), Inter-American Court of Human Rights, 11 Eur.Ct.H.R. at 33, (1987)

[504] *See supra* note 223 and accompanying text.

[505] *See supra* note 503.

[506] GC, *supra* note 29, at art. 78.

[507] Israel, *supra* note 255, at 125.

[508] *Habeus Corpus as a Non-Derogable Remedy to Guarantee the Protection of Non-Derogable Human Rights,* UN Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th Sess., Provisional Agenda Item 10(a), at I21, U.N. Doc. E/CN.4/Sub.2/1996/19 (1996).

Dismissing these petitions based on the "political question" doctrine would be a mistake because they are primarily issues of individual liberty subject to official U.S. action. Foreign tribunals have proven themselves capable of balancing the individual's liberty interest against the state's need to protect its citizens in rulings on similar petitions resulting from detention during state emergencies.[509] The reviewing district court could perform this balancing test as well. Granting detainees' habeus corpus petitions would enhance the mission's legitimacy in the conduct of the OOTW.[510]

C. Record-Keeping.

The transfer of detainees to the Haitian government in Operation Uphold Democracy emphasized the importance of maintaining comprehensive nonclassified files on each detainee. When the MNF requested that the Haitian Minister of Justice Exume "ensure quick judicial review of all detainees," the Minister of Justice requested that the files be delivered to him to expedite this judicial review.[511] The MNF then discovered that the files at the detention facility contained little relevant information that would facilitate a

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[509] Murray v. United Kingdom, 19 Eur.Ct.H.R. (ser. A) at 193 (1995); Brannigan and McBride v. United Kingdom, 17 Eur.Ct.H.R. (ser. B) at 539 (1994); Brogan and Others v. United Kingdom, 11 Eur.Ct.H.R. (ser. A) at 17 (1979); Habeus Corpus in Emergency Situations, 11 Eur.Ct.H.R. at 33 (1987); Ireland v. United Kingdom, 23 Eur.Ct.H.R. (ser. B) at 23 (1976); Lawless v. Ireland, 1 Eur.Ct.H.R. (ser. A) at 15 (1979).

[510] *See* Appendix at ¶ 2-26*a*.

[511] Memorandum for Record, Colonel Brian X. Bush, subject: Detention Facility, ¶ 9 (13 February 1995).

judicial review.[512] The MPs had compiled these files for administrative purposes only.[513] The MI brigade could not give the Haitian Minister of Justice copies of their separately maintained files because they contained classified information.[514] In one case, a fifty page investigation of a detainee who had murdered two U.S. embassy personnel was missing from his file.[515] Part of the difficulty of maintaining these files stemmed from the failure of units that captured the Haitians to complete the required written documentation on the circumstances of capture.[516] One participant at the Operation Uphold Democracy Legal After Action Review voiced the opinion that the failure to maintain these files to facilitate transfer to the Haitian government was the detention facility's "worst error."[517]

The Body of Principles suggests that detainees's files contain 1)the reasons for the arrest, 2)the time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority, 3)the identity of the law enforcement officials concerned, 4)precise information concerning the place of

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[512] *Id.*

[513] *Id.*

[514] Reardon notes, *supra* note 81.

[515] *Id.*

[516] *Id.*

[517] Major Marc L. Warren, Recorder, Haiti After Action Review Conference, Charlottesville, VA (May 9, 1995), *quoting* Brigadier General John D. Altenburg, who was at the time a colonel and the Staff Judge Advocate of the XVIII Airborne Corps during Operation Uphold Democracy.

custody,[518] 5)duration of any interrogation and of the intervals between interrogations as well as the identity of the interrogators and other persons present,[519] and 6)records of any medical examinations, the name of the physician and the results of the examination.[520]

The detention facility commander should maintain comprehensive unclassified files on the detainees. In addition to the information assembled by the military police according to *AR 190-8*,[521] these files should contain the judge advocate's written summary of the initial hearing, written reports from the capturing soldiers, records of the decision to continue detention, records on the interrogations, results of the periodic reviews and any other information pertinent to the detainee (such as Criminal Investigative Division reports).[522]

IV. Conclusion

The goal of this paper is to demonstrate a need for uniform detainee procedures. Lack of agreement over these standards' contents or promulgation must not stop the Army from pursuing development of these standards. In most areas, there is no reason why detainees should not receive treatment comparable to the standards enunciated in the

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[518] Body of Principles, *supra* note 135, at princ. 11.

[519] *Id.* at princ. 23.

[520] *Id.* at princ. 26.

[521] AR 190-8, *supra* note 25, at ¶¶ 2-7 through 2-10.

[522] *See* Appendix at ¶¶ 1-5*d*, 1-7.

GPW. However, detainees are not prisoners of war. International law, as confusing as it may be, grants detainees rights that add to and differ from those afforded to prisoners of war. The U.S. must develop some kind of system to ensure that these it grants these rights in every OOTW involving long-term detention of civilians. Inconsistent application of these rights can have devastating effects on the United States' position as a leader in the realm of human rights. The U.S. can no longer afford to escape criticism in this arena by excusing it as a "legal vacuum."

President Clinton has stated that "[w]e advance our interests at home by advancing the common good around the world."[523] The U.S. cannot be a leader in promoting this "common good" if its military fails to promote it in OOTW around the world. Uniform detainee procedures are one step towards promotion of this "common good."

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[523] Clinton, *supra* note 160, at 517.

APPENDIX

Uniform detainee procedures, tailored for inclusion into Army Regulation 190-8, Enemy Prisoners of War Administration, Employment, and Compensation (2 December 1985).

AR 190-8, 2 December 1985, is changed as follows:

Cover. **Title** is superseded as follows: Detainee Administration, Employment, and Compensation.

Page 1. **Title** is superseded as follows: Detainee Administration, Employment, and Compensation.

Page 1. Add the following to **Chapter 1** of the **Table of Contents**: **Due Process Procedures for Detention of Civilians in OOTW o 1-7**.

[The recommended changes to this Regulation mainly consist of changing all references to "enemy prisoners of war," or "EPW" to "detainees;" all references to "prisoner of war camps," "EPW internment facilities," and "EPW camps and branch camps located in the United States," and the like to "detention facilities;" and all references to "EPW camp commander," or "camp commander" to "detention facility commander." More extensive changes are listed below.]

Page 3. Paragraph 1-1 is superseded as follows: **Purpose**. This regulation prescribes policies, procedures, and responsibilities for administering, employing, and compensating persons detained by the US military, to include enemy prisoners of war (EPW), retained personnel (RP), and those persons detained during OOTW. Treatment of civilian internees is addressed in Army Regulation 190-57, Civilian Internee-Administration, Employment, and Compensation (4 March 1987).

Page 4. Paragraph 1-4, **Responsibilities** is superseded as follows: Under the provisions of the Geneva Conventions and customary international law, the United States is responsible, from the time of capture, for proper and humane treatment and accountability of persons covered by this regulation. Specific responsibilities are as follows:

Page 4. Paragraph 1-4*d* is superseded as follows:

d. Commander, US Army Forces Command (CDRFORSCOM). CDRFORSCOM is responsible for-

(1) Matters pertaining to detention facilities.

(2) Training of persons in the proper administration and operation of detention facilities, to include-

(*a*) Processing.

(*b*) Accountability.

(*c*) Internment.

(*d*) Care.
(*e*) Treatment.
(*f*) Discipline.
(*g*) Safeguarding.
(*h*) Use.
(*i*) Education.
(*j*) Repatriation.
(*k*) Due Process.
(3) Security matters connected with custody and use of detainees.

Page 4. Paragraph 1-4*j* is superseded as follows:

j. US Army commanders. Upon approval of CINC of the operation during which the detainees are captured, US Army commanders will negotiate and prepare detainee labor contracts to include-

Page 4. Paragraph 1-4, add *l* as follows:

l. Commanders in Chief (CINC) of the operation during which the detainees are captured. This CINC is responsible for-

(1) Approval of all requests for detainee labor by contract employers and by Federal agencies other than DOD in accordance with paragraph 3-3*c*.

(2) Execution of the due process procedures in paragraph 1-7, when applicable.

(3) Approval of detainee transfer to host nation facilities in accordance with paragraph 2-24*b* of this regulation.

Page 4. Paragraph 1-5*a*(1) is superseded as follows:

a. General. Basic US policy on the treatment given detainees requires and directs that-

(1) All persons captured, interned, or otherwise detained in US Army custody will be given humanitarian care and treatment from the moment of custody until final release or repatriation.

Page 5. Paragraph 1-5*b* is superseded as follows:

b. Humane treatment. All persons will receive humane treatment without adverse distinction based on race, nationality, religion, political opinion, or other criteria. No person will be murdered, mutilated, tortured, degraded; nor will any person be punished for alleged criminal acts unless previous judgment has been pronounced by a legally constituted court. The courts must have given that person those judicial guarantees recognized as indispensable to a fair trial. Individuals, as well as capturing nations, are responsible for acts that are committed against persons in violation of the Geneva Convention. The text of the Geneva Convention, its annexes, and any special agreements, to include the text of this regulation, will be posted in each detention facility in the language of the detainees. Copies of the texts will be supplied, on request, to persons who did not have access to posted copies.

Page 5. Insert at the end of paragraph 1-5*d* the following sentence:

The interrogators must complete a DA Form zzzz-R before departing the detention center after every interrogation. The detention facility commander will retain this form in the detainee's personnel file. A copy for reproduction purposes is located at the back of this regulation.

Page 5. Add paragraph 1-7 as follows:

1-7. Due process procedures for detainees in operations other than war.

a. Upon approval from the Joint Chiefs of Staff or higher authorities for long-term civilian detention in an operation other than war, the CINC of the operation will:

(1) Establish all grounds for detaining civilians in the operations order and rules for engagement.

(1) Ensure that the hearing officer, preferably a judge advocate, meets with each detainee within 48 hours of capture to inform the detainee of the grounds for detention, to explain to the detainee what rights are available under this regulation, and to allow the detainee to explain why continued detention is inappropriate. The hearing officer will prepare a DA Form xxxx-R for each detainee and forward it to the CINC. A copy for reproduction purposes is located at the back of this regulation.

(2) Approve continued detention of each detainee, within 48 hours of capture, based on the grounds for detention established in the operations order or rules of engagement. The CINC should consult the DA Form xxxx-R, the detention facility commander, appropriate military intelligence records and/or personnel, appropriate military police records and/or personnel and the staff judge advocate in making this decision. The CINC will complete a DA Form yyyy-R on each detainee. A copy for reproduction purposes is located at the back of this regulation.

(*a*) When the CINC disapproves continued detention, he or she will indicate this on the DA Form yyyy-R, block A. The CINC will expeditiously forward this form to the detention facility commander, who will provide for that detainee's release at the location where the capture occurred.

(*b*) When the CINC approves continued detention, he or she will indicate this on the DA Form yyyy-R, block B. The CINC will forward the DA Form yyyy-R to the detention facility commander within 48 hours of the detainee's capture. The detention facility commander will retain the DA Form yyyy-R in the detainee's personnel file.

(*c*) When the CINC needs additional time to make a decision regarding continued detention, he or she will indicate this on block C1 of the DA Form yyyy-R, along with the reason for the delay in block C2. The CINC will forward the DA Form yyyy-R, with blocks C1 and C2 completed, within 48 hours of the detainee's capture, to the detention facility commander. At this point, the CINC has ten days from the date of the detainee's capture to decide on that detainee's continued detention.

(3) Review the grounds for the detainee's continued detention every thirty days. The CINC must indicate the results of these reviews in block D of DA Form yyyy-R.

(4) If desired, delegate the duties outlined in subparagraphs *b* and *c* to a staff principle officer or the staff judge advocate. This delegation must be in writing.

b. The detention facility commander must:

(1) monitor compliance with this paragraph. If the detention facility commander receives no DA Form yyyy-R, or no other communication regarding the detainee's disposition from the CINC or delegated representative, within 48 hours of the detainee's capture, then the detainee must be released. The detention facility commander may not be punished or otherwise penalized for good faith compliance with this paragraph's provisions.

(2) ensure that the personnel file of every detainee whose continued detention the CINC approves contains the DA Forms xxxx-R, yyyy-R, zzzz-R and 4237-R (or other form used to document the circumstances of capture and record personal property taken from detainees).

(3) permit retained attorneys of detainees in operations other than war to have reasonable access to their clients in detention, subject to security concerns and facility discipline.

Page 5. Paragraph 2-2*d* is superseded as follows:

d. Operation. Detention facilities will be organized and operated, when possible, as other military commands. Each facility will be commanded by a commissioned officer of the US Army. The provisions of the Geneva Convention, for EPWs, and of this regulation, for all detainees, will be observed.

Page 5. Paragraph 2-4 is superseded as follows:

2-4. DA Form 4237-R (Detainee Personnel Record). DA Form 4237-R must be prepared for each detainee in custody of the US Army. The capturing unit must present this form to the detention facility commander upon transferring the detainee to the facility. A copy is also furnished to the monitoring branch of the Detainee Information System. All pertinent information available or that the detainee is able to give will be entered on the form. Specific instructions for preparing this form can be found in the DIS Functional Users Manual. DA Form 4237-R will be reproduced locally on 8 1/2- by 11-inch paper. A copy for reproduction purposes is located at the back of this regulation.

Page 5. Paragraph 2-5, add *f* as follows:

f. The letters "DET" will follow the second component of the ISN of those persons captured during OOTW; for example, US4CN-00001DET. In this case, the third symbol will be two letters standing for the detainee's nationality.

Page 5. Paragraph 2-6(1) is superseded as follows:

(1) A detainee may be required to show the identify card issued by his or her government; however, in no case may the card be taken from the detainee. For detainees, this card could consist of a driver's license or other card from a government agency.

Page 5. The first two sentences of paragraph 2-6(2) are superseded as follows:

(2) If a detainee does not hold an identity card issued by his or her government as specified above, the detainee will be issued a completed DA Form 2662-R. The identity card will be in the possession of the detainee at all times.

Page 6. Paragraph 2-6, add *d* as follows:

d. Detention facility commanders may substitute issuance of an identification bracelet for issuance of the DA Form 2662-R. This bracelet must be constructed and attached in such a manner that detainees cannot remove them by themselves. The bracelet will be inscribed with the detainee's ISN.

Page 6. Paragraph 2-7*g*(1) is superseded as follows:

g. Medical records, forms, and notices.

(1) The medical records and forms used for hospitalization and treatment of US Army personnel, together with the forms prescribed in this regulation, will be used for detainees (AR 40-400 and AR 40-66). They will be stamped properly with the letters "DET" at the top and bottom of each form. Medical and dental records will accompany persons when they are transferred.

Page 6. Paragraph 2-10 is superseded as follows:

2-10. Detainee Information System (DIS). DIS is an independent part of the Military Police Management Information System. It provides accurate and complete accounting data on all persons detained by the United States during military operations. The DIS fulfills the Geneva Convention reporting requirements. DA Form 4237-R and DA Form 2674-R are used as source documents. The DIS Functional Users Manual contains details of the system.

Page 6. Paragraphs 2-11*a* and *b* are superseded as follows:

2-11. Personal effects.

a. All personal effects, including moneys and other valuables, will be safeguarded.

b. Metal helmets, gas masks, and like articles issued for personal protection will remain in the possession of each individual detainee. However, in an operation other than war, all of the detainees' personal effects, except for an identity card issued by a foreign nation's governmental agency or the US, when the detainees are suspected of criminal conduct or of being a threat to force security, may be retained at the discretion of the detention facility commander.

Page 6. Paragraph 2-11*c*(3), add as follows:

A copy of the statement will be forwarded to the proper Information Center and to the servicing Staff Judge Advocate's office for possible future claims action.

Page 7. Paragraph 2-12 is superseded as follows:

2-12. Consideration of persons in detention facilities.

a. Segregation and treatment. Detainees will be interned in facilities according to their nationality and language, but will not be separated from other prisoners belonging to the armed forces they were serving with at the time of their capture, except with their consent. Female detainees will be separated from all male detainees and treated as favorably as male detainees. The detention facility commander has the discretion to order any further types of segregation.

Page 7. Paragraph 2-14, add *c* as follows:

c. In operations other than war, detention facility commanders should permit reasonable family visitation subject to security concerns and detention facility discipline.

Page 8. Paragraph 2-16, add c(1)(*g*) as follows:

(*g*) Contain references to the location of the detention facility.

Page 10. Paragraph 2-18*b*, add as follows:

Detainees in operations other than war may not be tried by courts-martial or civil courts. Only disciplinary measures may be taken against them.

Page 10. Paragraph 2-18*d* is superseded as follows:

d. Detainee rights. Before any disciplinary punishment is pronounced, detainees will be given written notice regarding the offenses of which they are accused and precise information regarding these offenses. They will be given a chance to explain their conduct and defend themselves. They will be permitted to call witnesses and to have recourse to the services of a qualified interpreter, if necessary. The decision on the offenses will be announced to the detainee and to the detainee's representative.

Page 11. Paragraph 2-19*a* is superseded as follows:

a. No EPW will be tried or sentenced for an act that was not forbidden by US law or by international law in force at the time the act was committed. No detainee in operations other than war may be tried by court-martial for any offense.

Page 13. Paragraph 2-24 is superseded as follows:

2-24. Repatriation of other detainees.

a. Repatriation of other EPW. Other than sick or wounded detainees will be repatriated or released at the cessation of hostilities as directed by State Department and DOD instructions.

b. Transfer of detainees in operations other than war to host nation custody. Detainees in operations other than war may be transferred to host nation custody only upon approval by the CINC of the operation where the detainees were captured, and only upon the host nation's assurance that the detainees will receive treatment comparable to that required by the Geneva Conventions and this regulation. The host nation must agree to allow the US military access to its detention facilities to inspect and monitor the treatment of these detainees. The CINC is encouraged to conclude a Memorandum of Agreement with the appropriate host nation officials regarding detainee transfer. A sample MOU is included at figure 1 in this regulation. The detainees' personnel files will accompany them to the host nation facility.

Page 15. Paragraph 2-26*a* is superseded as follows:

a. Persons may make complaints or requests to the detention facility commander who will consider and attempt to settle them. If detainees are not satisfied with the way the commander handles complaints and requests, they may submit them in writing

through channels to ODCSPER. Detainees may also petition the appropriate US federal district court for a writ of *habeus corpus*.

Page 16. Paragraph 3-1*b* shall be relabeled as paragraph 3-1*c*, and the following added as paragraph 3-1*b*:

b. Detainees in operations other than war will not be a monthly allowance. When appropriate and to the greatest extent possible, military officials will ensure that the detainee's dependents are cared for during the duration of the detention.

Page 16. Paragraph 3-3, add *c* as follows:

c. Detainees in operations other than war may be employed in contract work only upon the approval of the CINC of the operation during which the detainees were captured. The CINC should consider the severity of the crime of which the detainee is accused in making this decision.

Page 31. The following entries will be added to the glossary:
Under Section I, Abbreviations:

Delete

PWIC. Prisoner of War Information Center.
PWIS. Prisoner of War Information System.

Add

CINC. Commander in Chief.
DIC. Detainee Information Center.
DIS. Detainee Information System.

Under Section II, Terms:

Detainee is superseded as follows:
A person captured or otherwise detained by a military force, to include prisoners of war, retained personnel, civilian internees, civilians captured during international armed conflicts who do not fit the GPW definition of a prisoner of war, and civilians captured during operations other than war.

Add

Detainee Information Organization. An organization set up to collect information on detainees in custody of each party in an operation and transmit information as rapidly as possible to the country of origin of the detainee or to a power on which they depend.

Detention Facility. A facility set up by the US army for the internment and administration of detainees.